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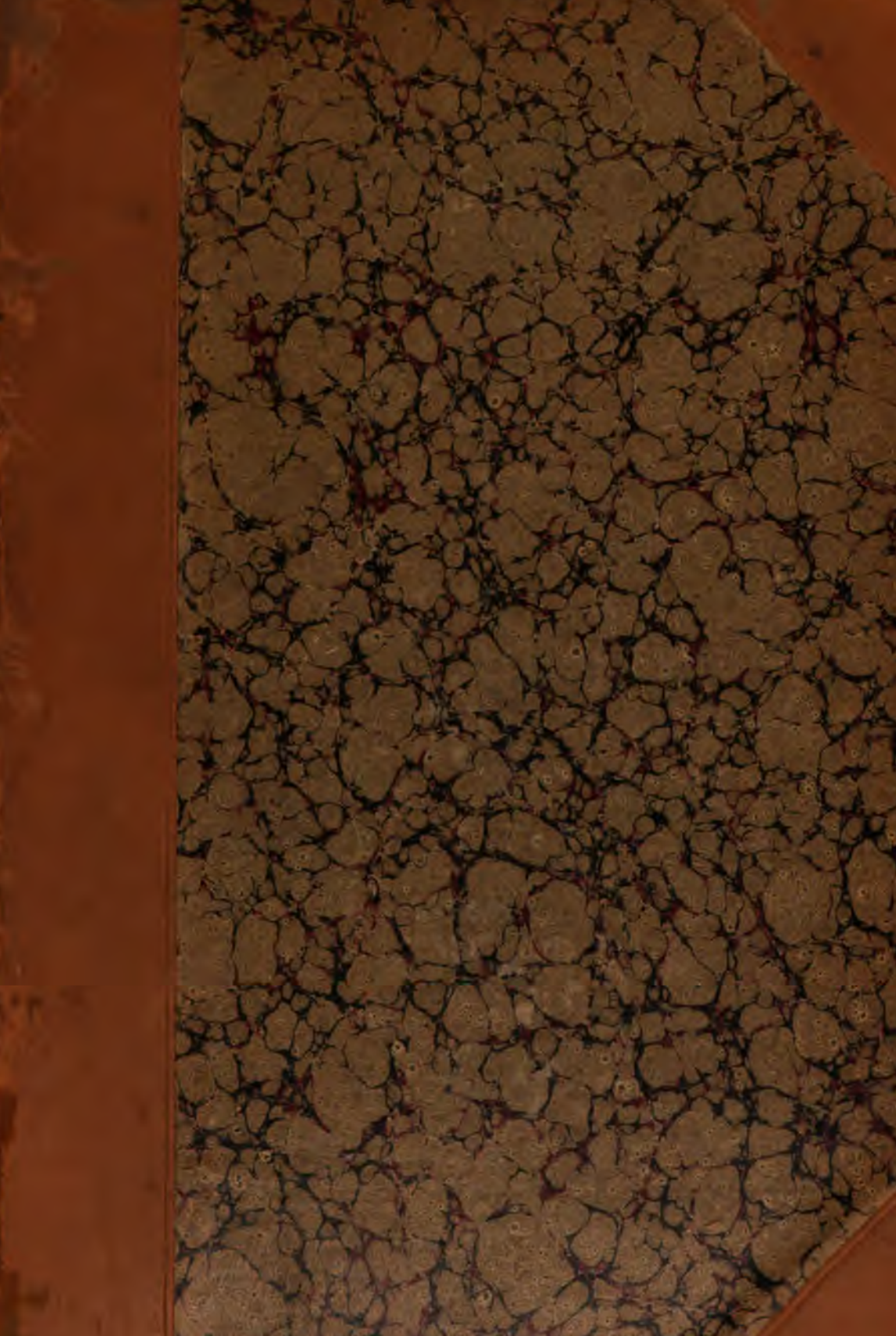
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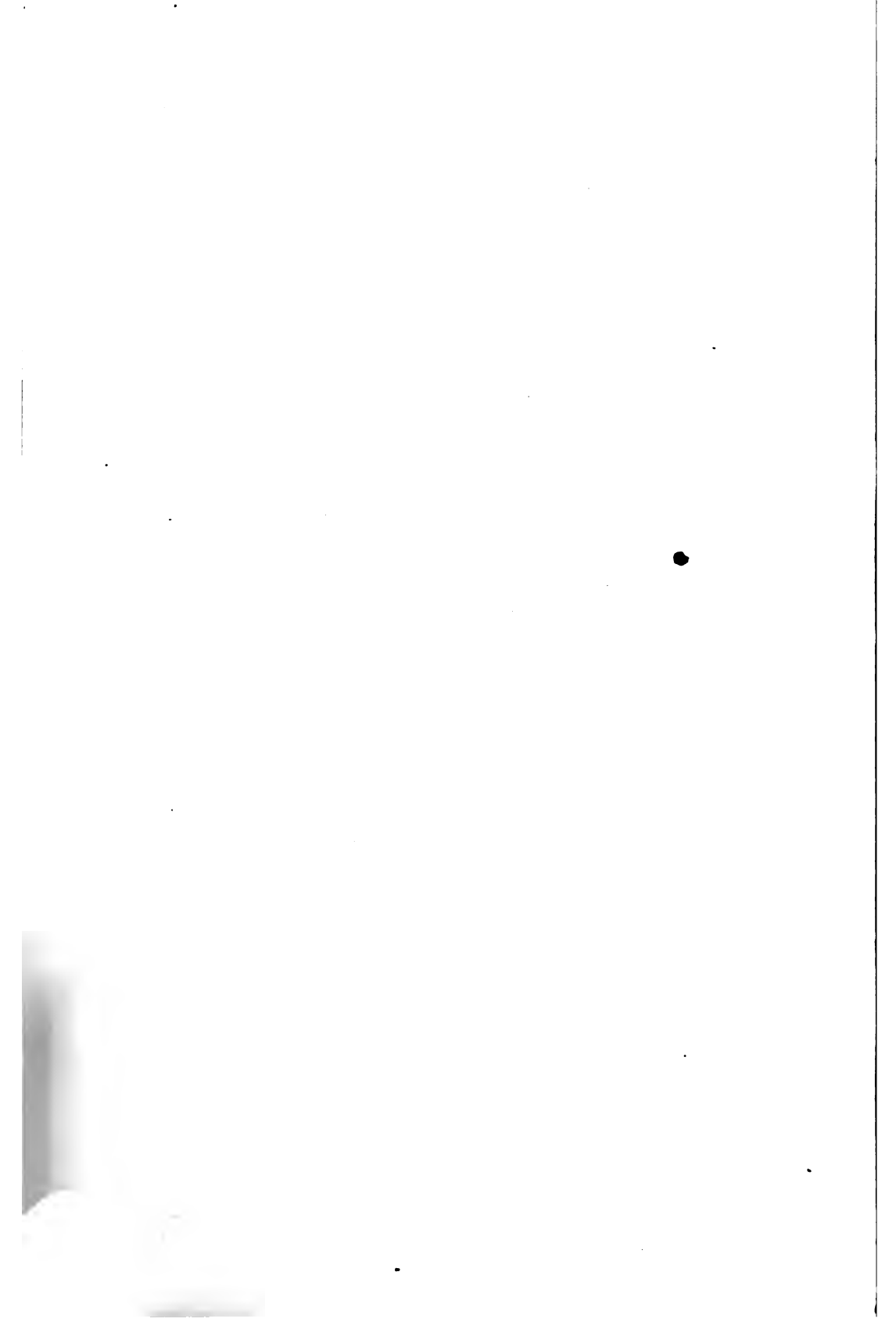
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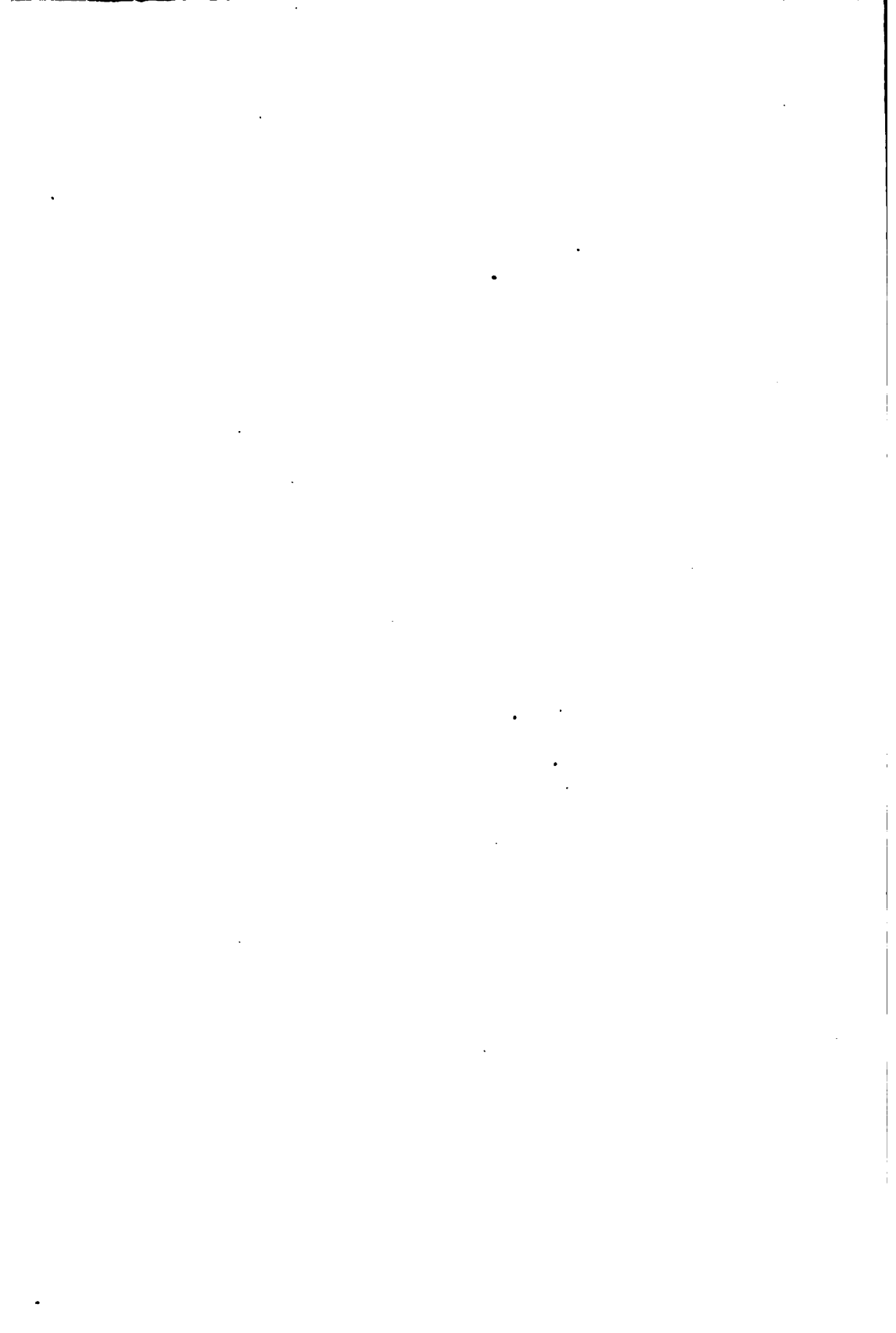
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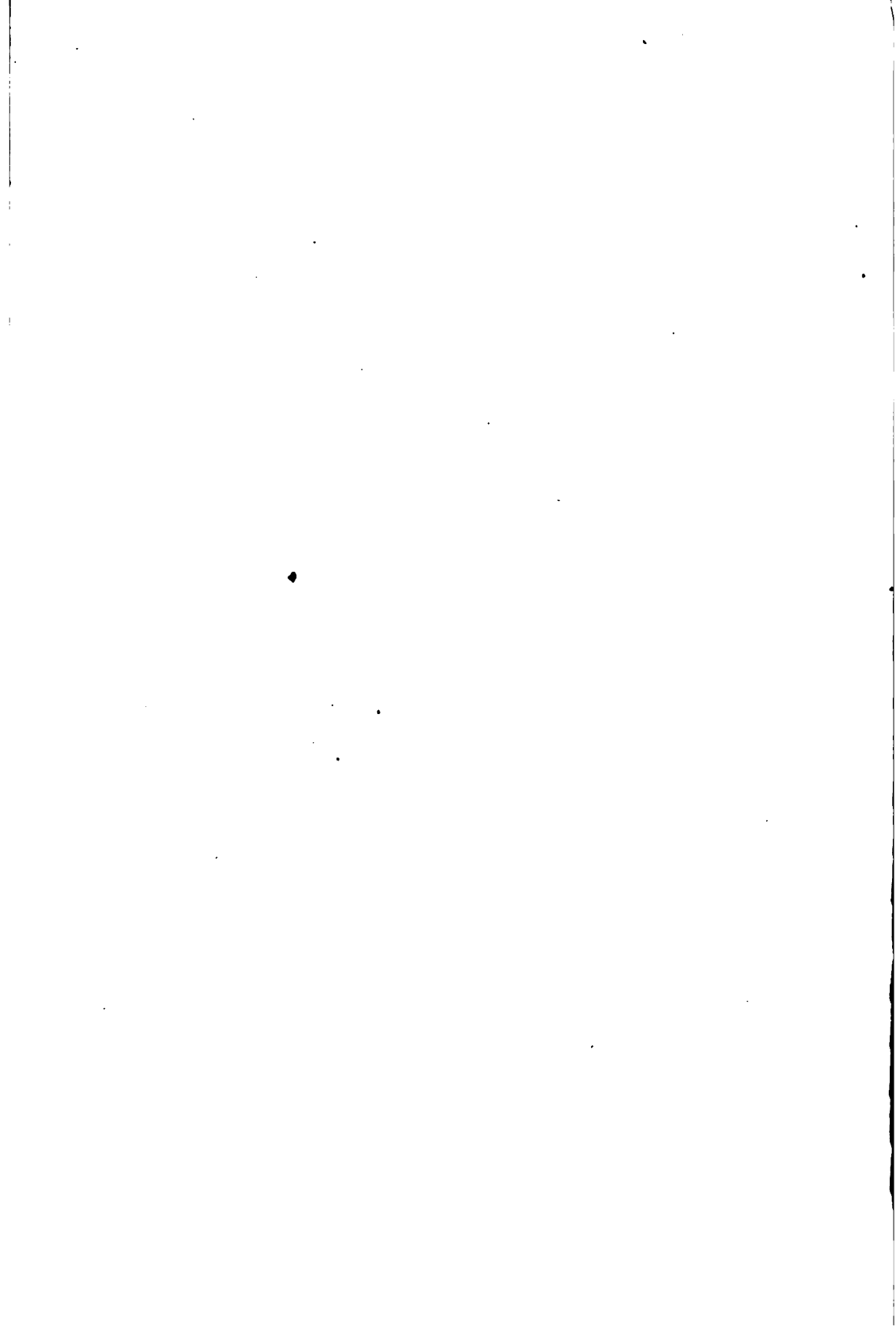
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LEGAL NEWS

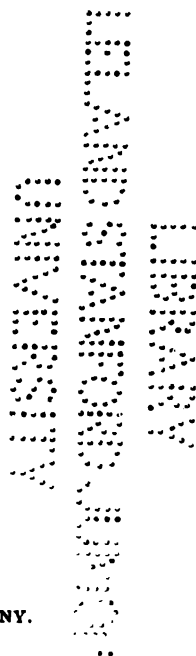
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JAMES KIRBY, Q.C., D.C.L., LL.D.

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JAMES KIRBY, Q.C., D.C.L., LL.D.

MONTREAL:

1893

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THE LEGAL NEWS.

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No. 1 & 2.

CURRENT TOPICS AND CASES.

The authority of the legislature being invoked in Ontario, to compel the Law Society to admit women to the practice of the profession, the question was disposed of by giving the Law Society power to admit. This, of course, was not imperative, as was held recently by our own Court of Appeal in the case of *College of Physicians and Surgeons & Pavlides*, with reference to holders of foreign medical diplomas. But on the 27th of December the Benchers of the Law Society, by the close vote of 12 to 11, resolved to admit women to practice as solicitors. Doubts have been expressed whether this vote represents the real sentiment of the profession, and it is urged that such an important change should not be made without the endorsement of the whole Bar. It is probable that the Benchers were influenced to a considerable extent by the action of the legislature, and that some of those who voted for the resolution are not very enthusiastic supporters of the innovation.

Several inquiries having been received with reference to the Reports published by the Quebec Bar, a few words of explanation may be desirable. The facts, as we gather them, are that the General Council, having but a limited sum at their disposal for the publication of the reports, entrusted the printing to a printer whose tender was the

lowest, but whose establishment was imperfectly equipped for the execution of a considerable work. Vexatious delays in the issue of the monthly parts as well as many imperfections in the typography of the work have resulted. As the contract was only for the year 1892, the General Council did not consider it expedient to renew it, and the work of printing and issuing the reports for 1893 has been transferred to the Gazette Printing Company, which has printed the 14 volumes of the Montreal Law Reports, 15 volumes of the Legal News, besides many other legal publications, and possesses facilities for despatch which cannot be obtained in a small printing office. The question of the arrears for 1892, at the time of writing, is causing some difficulty, but will soon be settled. Some changes in the reporting staff take effect from the beginning of the new year. Mr. Justice Mathieu retires, Mr. Kirby has been appointed chief editor, and Mr. P. B. Mignault has been appointed to the vacancy at Montreal occasioned by Mr. Justice Mathieu's retirement. The Reports for 1893 will begin with the January decisions, and some little time must necessarily elapse before there will be enough matter for the issue of the first numbers, but it is expected that as soon as the arrears of 1892 can be overtaken the issues will keep pace with the decisions.

The Supreme Court of South Carolina, in *Brennan v. Winkler*, Nov. 3, 1892, held that a trust "for the education of young men for the priesthood, or to educate individual orphan boys or orphan girls," is void for uncertainty, and that parol testimony to show that testatrix prepared her own will, that she had been reared as a Catholic, and by the use of the word "priesthood" probably meant that of the Catholic Church, was properly excluded. "The rule," the Court observed, "certainly is that the intention of a testator must be disclosed by the will itself, with possibly two exceptions: In the cases of a latent ambiguity, and of explaining the particular language used in

the instrument. We are unable to see that either of these exceptions are applicable here. We can conceive of no parol testimony admissible in this case, unless it may possibly be such as is allowed by the rule which permits extrinsic parol evidence 'as to the circumstances of the testatrix and her family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testatrix;' that is to say, to enable the judge to put himself, as near as possible, in the place and situation of the testatrix when she wrote her will."

In *Samoisette & Brassard*, the Court of Appeal, Montreal, Dec. 23, 1892, held that the civil courts have no jurisdiction to interfere with the canonical or civil erection of parishes. The canonical erection is a matter solely within the jurisdiction of the ecclesiastical authority, and the civil erection is within the jurisdiction of the provincial government. Mr. Justice Hall differed from the majority of the Court.

In *Lyle v. State*, the Court of Appeals of Texas, June 25, 1892, held that a statute which enacted that intoxication shall not constitute any excuse for crime, nor mitigate the degree or penalty thereof, does not mean that it may not be considered on an indictment for perjury, for the purpose of showing whether defendant's condition was such at the time of the perjury as to indicate the wilfulness and deliberation necessary to the crime.

The late Montagu Williams, Q.C., was a well-known character in London. He was first a schoolmaster, then a soldier, then an actor and writer of farces, and finally was called to the bar at the age of 28. His strong point was the defence of prisoners. While in extensive practice he was compelled to desist from work by a painful throat trouble which necessitated the removal of half the larynx, a dangerous operation which, however, saved his life and

restored his health, but rendered the continued exercise of his profession impracticable. The Government considerately appointed him a police magistrate, a position in which he continued to be actively useful. A curious circumstance recorded by him in his "Later Leaves," with reference to the Whitechapel murders, will be found in 14 Legal News, 176.

The new revised edition of English Statutes contains in five volumes all the enactments to the beginning of the present reign which were formerly comprised in 77 volumes. It is estimated that the work will be brought down to the present time in twenty volumes. All preambles are omitted which do not affect the construction of the Acts, or which are not of historical value.

SUPREME COURT OF CANADA.

OTTAWA, October, 1892.

Quebec.]

GREAT EASTERN RAILWAY V. LAMBE.

Opposition afin de charge—Pledge—Art. 419, C. C.—Agreement—Effect of—Arts. 1977, 2015 & 2094, C. C.

The respondent obtained against the Montreal & Sorel Railway Company, a judgment for the sum of \$675 and costs, and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal & Sorel railway, the appellants who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them, for the disbursements they had made on it, and filed an opposition *afin de charge* for the sum of \$35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal & Sorel Railway and the appellant company, and stated, amongst other things, that "the Montreal & Sorel Railway company was burthened with debts and had neither money nor credit to place the the road in running order, etc." The amount claimed for disbursements, etc., was over \$35,000. The Superior Court, whose

judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *afin de charge*. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction, heard the appeal on the merits, and it was

Held, 1st, that such an agreement must be deemed in law to have been made with intent to defraud, and was void as to the anterior creditors of the Montreal & Sorel Railway Company.

2nd, that as the alleged deed of pledge affected immovable property, and had not been registered, it was void against the anterior creditors of the Montreal & Sorel Railway Company. Arts. 1977, 2015 & 2094, C. C.

3rd, that art. 419, C. C., does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors, for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an opposition *afin de conserver* to be paid out of the proceeds of the judicial sale. Art. 1972, C. C.

Appeal dismissed with costs.

Loneragan for appellant.

Choquette for respondent.

OTTAWA, Oct. 10, 1892.

Ontario.]

HARRIS v. ROBINSON.

Contract—Specific performance—Time—Extension—Waiver—Rescission.

H. made an offer to R. for exchange of properties on specified terms, the matter to be closed within ten days if possible. R. accepted the offer. He had not at the time the title to the property he proposed to transfer, but had an agreement for the sale of it with one S. who had a similar agreement with the holder of the title. Several interviews took place between the parties and their solicitors both before and after the ten days elapsed, and the registry office was visited where it was found that the contract which formed the title of S. was not registered, and also that there was an annuity charged against the lands which R. was to transfer. These matters were pointed out to S. who

took no active steps to remove them. Finally a letter was sent by H. to R.'s solicitor, informing him that unless something was done in regard to the proposed exchange by the following morning the agreement would be considered null and void. After this letter was written R. took proceedings to enforce his agreement with S. and obtained a decree declaring his title to the property he proposed to transfer to H. a valid title, and he then brought a suit against H. for specific performance of the agreement for exchange. This suit was tried before Armour, C.J., who dismissed the action, holding that time was of the essence of the contract. His judgment was reversed by the Divisional Court, and on further appeal to the Court of Appeal the judges were equally divided in opinion and the decision of the Divisional Court stood.

Held, reversing the decision of the Court of Appeal (19 Ont. App. R. 134), and of the Divisional Court (21 O. R. 43), Taschereau, J., dissenting, that the action could not be maintained; that as the evidence established that R. had no title whatever at the date of the agreement to the land he proposed to transfer to H., the latter was not bound to give reasonable notice of intention to rescind, as he would have been if the title had been imperfect merely; that the letter to R.'s solicitor, put an end to the contract; and independently of any rescission the conduct of R. was such as to disentitle him to relief by way of specific performance.

Held, further, affirming in this respect the judgment of the Courts below, that time was originally of the essence of the contract, but H. had waived the necessity to adhere to the time specified by negotiating as to the title after it had expired.

Appeal allowed with costs.

Reeve, Q.C., for the appellant.

Hodgins & Coatsworth for the respondent.

OTTAWA, Oct. 19, 1892.

British Columbia.]

EDMONDS V. TIERNAN.

Mechanic's lien—Suspension—Waiver—Taking promissory note for amount.

T. was building a house under contract and E. supplied him with material, taking a promissory note for \$1,100, the amount

of his account. The note was discounted but dishonoured at maturity, and E. took it up and filed a mechanic's lien against the property which T. had been building. Prior to this the owner had paid T. \$500, and afterwards, but when was not certain, he paid \$600 more. In an action by E. to enforce his lien :

Held, affirming the judgment of the Supreme Court of British Columbia, that E. had waived his lien by taking the note which suspended the lien during its currency, and there being nothing in the Lien Act to show that, being once abandoned, it could be revived again; that even assuming that only part of the amount had been paid to T. before the lien was filed, it would be absolutely gone.

Appeal dismissed with costs.

Cassidy for the appellant.

Chrysler, Q.C., for the respondents.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1891.

Coram Sir F. G. JOHNSON, C.J.

Ex parte FILIATRAULT, petitioner for *certiorari*; DEMONTIGNY, Recorder, and THE CITY OF MONTREAL, respondent.

Sale of liquor to minor—R. S. Q. 921—Conviction.

HELD:—*Under R. S. Q. 921, a conviction which merely alleges an illegal selling of liquor to a minor, without stating that the sale was made to a minor the seller knowing him to be a minor, is bad.*

JOHNSON, C.J.:—

The writ in this case was granted by my brother Wurtele, and the return shows a conviction by the Recorder for illegally selling to a minor. The question is whether under Art. 921 of the Revised Statutes which deals with persons licensed to sell spirituous liquors, and was subsequently amended by the 54 Vic., c. 18, a conviction is sufficient which merely alleges an illegal selling to a minor. The Art. 921 said that intoxicating liquors shall not be sold to drunken persons, or to minors, or, after eight o'clock at night, to soldiers, sailors, apprentices or servants, known as such by the master of the house. The punctuation perhaps left it literally unexpressed whether the knowledge of minority was within the intention of the law; but if the matter

merely stood there, I don't think it would be doubtful whether, by law a man could be held to commit an offence by an act of which he had no knowledge. The power of legislation given to the provinces would surely not extend to the creation of a new species of offence unknown to English criminal law. But I am satisfied that the provincial law had no intention of creating an offence without knowledge. The amending Art., sec. 23, added the following to Art. 921, viz.: "Intoxicating liquors shall not "at any time be knowingly sold to a minor in a club licensed "under Art. 857." Knowledge,—The *mens rea*, is of the essence of every offence, and the meaning of Art. 921, even without the word 'knowingly' subsequently used in the amendment, must be held to include knowledge. Nor can any reason be suggested why knowledge of minority should be required by those who sell in clubs, and not by those who sell elsewhere. This, then, being my view of the law, it is hardly necessary to add that the conviction should not have been merely for illegally selling to a minor; but for illegally selling to a minor knowing him to be so. The cases are well known and were cited at the bar where the general words of a statute are not a sufficient description of an offence in a conviction. In *R. v. Chapman*, Ch. J. Ryder laid it down as law, founded on the 3d Inst. 41, that although the words of a statute by which an offence is described are general (as in Art. 921), yet the description of the offence in an indictment, (and it would seem even more especially in a conviction), must be particular. A most revolting injustice would result from an opposite view of the law. I must interpret the will of the legislature to have been just and reasonable and not to inflict an intolerable wrong on a class of persons whose trade is licensed by the state. The conviction is therefore quashed. At the same time, however, while the law requires a legal statement of an offence on the record to give jurisdiction to the Recorder, it is to be observed that the amending Act, sec. 16, requires licensees to use precautions to prevent illegal drinking, and though the point is not strictly before me as to what would constitute evidence of knowledge of minority, if it was alleged, I feel constrained to call the attention of those who are more immediately concerned to the tremendous responsibility they incur by selling intoxicants to the young. The exercise of common sense and judgment is required by the law from licensees, and when persons whose youthful appearance ought alone to arouse suspicion present themselves, society has at least a right to expect the precaution

which the law enjoins, in view of the enormous evils arising from abuse of the liquor traffic, particularly in such cases.

The judgment reads as follows :

"The Court having heard the parties by their respective counsel, as well upon the petitioner's motion to quash the conviction rendered in this cause on the 26th March last (1891), by B. A. T. DeMontigny, Esq., Recorder of the City of Montreal, as upon the motion of the respondent, the City of Montreal, to quash the writ of *certiorari* issued in this cause, examined the proceedings and deliberated ;

"Considering that the alleged conviction contains no sufficient statement of a legal offence so as to give jurisdiction to the Recorder ;

"Doth quash the said conviction with costs."

Ouimet & Emond for petitioner.

Roy & Ethier for respondent.

THE LAW OF CONSPIRACY—REGINA v. MERCIER AND PACAUD.

Several points of importance arose on the trial, at Quebec, of the charge of conspiracy against Messrs. H. Mercier and E. Pacaud, and were noticed in the charge of the presiding judge, Wurtele, J., before leaving the case to the jury. The following is a report of the charge, revised and approved by the learned judge:—

Messieurs les Jurés, — Nous sommes maintenant rendus à la phase de ce long et important procès où il ne nous reste plus que deux choses à faire.

Il me reste, à moi, de vous expliquer la loi se rapportant à l'accusation portée contre les défendeurs et de vous rappeler la preuve qui a été faite, et à vous d'étudier en conscience et au meilleur de vos capacités cette preuve; et, quand vous l'aurez examinée, de rendre le verdict que votre conscience vous dictera.

On a dit, pendant le cours des débats, que ce procès était un procès politique. Il se peut que la cause présente des aspects politiques; la cause peut avoir, sous certains rapports, un aspect politique, mais la cause en elle-même n'est pas une cause politique. Nous ne sommes pas appelés à juger ici les actes politiques des défendeurs, mais à décider si l'accusation qui est portée contre eux, sous la loi criminelle du pays, est vraie ou non.

Quant à l'honorable M. Mercier, notre mission n'est pas de nous enquerir et de déclarer s'il a bien ou s'il a mal administré les affaires de la province. Cela, c'est l'affaire de la législature et de l'électorat. Notre mission ici est judiciaire ; c'est à nous à décider si oui ou non, en accomplissant un acte ministériel, il a commis, en dehors de ses fonctions ministérielles, un acte individuel qui enfreint la loi criminelle du pays.

L'accusation portée contre les deux défendeurs est celle connue, dans le droit criminel, sous le nom de conspiration.

Une conspiration est le concert ou l'entente entre deux ou plusieurs personnes pour atteindre un but illégal, ou pour atteindre un but légal par des moyens illégaux. C'est l'entente entre deux ou plusieurs personnes pour faire une chose illégale ou pour faire une chose qui, sans être illégale en elle-même, sera préjudiciable à une autre personne, à une classe de personnes ou au public en général.

Dans le procès qui nous occupe, nous aurons à décider s'il y a eu ou non conspiration pour l'un ou l'autre des buts qui sont mentionnés dans l'acte d'accusation.

Avant d'aller plus loin, je me permets d'attirer votre attention sur l'importance des fonctions que vous êtes appelés à remplir en ce moment. Vous occupez, sous un certain rapport, une position analogue à celle que j'occupe, et dans cette position nous devons faire notre devoir sans considération pour les personnes, sans égard à la voix des passions politiques. Nous devons rendre justice, faire notre devoir honnêtement, au meilleur de notre connaissance, sans nous laisser influencer soit par des préjugés soit par des affections de parti.

Quand, il y a six ans, j'ai prêté serment comme juge de Sa Majesté dans cette province, j'ai juré devant Dieu d'oublier toute passion politique, d'apporter aux affaires qui me seraient soumises toute mon intelligence et de repousser les dictées de la partialité. Autant que la faiblesse humaine le permet, j'ai agi de la sorte ; et je demande à Dieu de m'aider afin que je puisse continuer à agir de même.

Quand vous êtes entrés l'autre jour dans la tribune du jury et que vous avez fait serment de juger entre la Couronne et les défendeurs d'après la preuve, vous avez prêté en effet le même serment que j'ai prêté moi-même il y a six ans, et ce serment vous oblige d'apporter à cette cause toute votre intelligence, de décider d'après la preuve seulement et d'écarter complètement, d'un côté les préjugés et de l'autre côté les sympathies que vous pourriez

avoir comme membre de l'un ou de l'autre des partis politiques du pays.

Je ne vous connais pas ; je ne vous ai jamais vus avant que vous ayez formé le corps des petits jurés, mais je crois, d'après votre physionomie et d'après l'attention que vous avez apporté à ce long procès, que vous essaieriez de faire ce que j'essaie toujours de faire, de juger sans partialité mais en même temps sans crainte.

Remarquez que nous aurons, vous et moi, à répondre plus tard de l'acte que nous accomplissons aujourd'hui. Et, si au lieu d'agir consciencieusement, si au lieu de décider d'après les témoignages, nous nous permettons d'écouter des sentiments soit d'inimitié, soit d'affection, nous deviendrons parjures au serment que nous avons prêté.

J'ai toute confiance que vous suivrez les dictées de votre conscience, que vous ne vous laisserez influencer en aucune manière par l'esprit de parti qui pourrait naturellement vous affecter en dehors de cette enceinte ; et que vous déciderez suivant la preuve et la loi.

Les défendeurs sont accusés :

1.—D'avoir, le 23 février 1891, illégalement conspiré et de s'être ligüés pour obtenir et s'appropriier illégalement, au moyen de divers artifices et sous de faux prétextes, la somme de \$60,000 des argents de Sa Majesté, c'est-à-dire, des argents du Gouvernement de la Province de Québec, avec l'intention de frauder Sa Majesté ;

2.—D'avoir, le même jour, illégalement conspiré et de s'être ligüés pour obtenir et s'appropriier, par les mêmes moyens, la somme de \$60,000 des argents d'une certaine banque appelée la Caisse d'Economie de Notre-Dame de Québec, avec l'intention de la frauder.

C'est ma fonction de vous dire quelle est la loi qui s'applique à cette accusation ; et vous êtes obligés d'accepter l'énoncé que je vous en ferai.

Votre fonction, à vous, c'est de considérer la preuve et, après l'avoir pesée, de déclarer si, d'après cette preuve et la loi telle qu'elle vous sera expliquée, les défendeurs sont coupables ou non de l'offense dont ils sont accusés.

Si, d'un côté, vous êtes obligés d'accepter l'exposé que je vous donnerai de la loi, d'un autre côté, je suis obligé d'accepter la déclaration que vous me ferez, par votre verdict, de votre appréciation de la preuve.

Je dois vous expliquer la preuve afin de vous aider, mais je ne dois pas vous influencer et je ne veux pas non plus le faire. C'est à vous de décider, dans votre conscience, quelle est la portée de la preuve qui a été faite, et de déclarer si, d'après cette preuve, les défendeurs sont coupables ou non. Je ne dois pas intervenir sur ce point. S'il est de mon devoir de vous rappeler les faits et de vous aider à comprendre la preuve, il est aussi de mon devoir de vous en laisser entièrement l'appréciation, et lorsque vous serez d'accord sur un verdict,—que ce soit un verdict de culpabilité ou d'acquiescement,—de l'enregistrer et de lui donner son effet.

Maintenant, je vais vous retracer brièvement la preuve qui a été faite devant nous.

Vous savez qu'il se consomme dans les bureaux du Gouvernement une grande quantité de papeterie, c'est-à-dire, le papier et les effets dont on se sert ordinairement dans les bureaux, tels que crayons, canifs et autres articles de cette nature. Il se dépense aussi une grande quantité de papeterie dans les bureaux des Cours de Justice à Québec et à Montréal, ainsi qu'une grande quantité de papier pour l'impression des rapports, des statuts et des documents dont le Gouvernement a besoin.

Depuis longtemps, on votait tous les ans pour chaque département une somme affectée à cette fin. Ce crédit était dépensé sous la direction du chef du département ou du sous-chef. On s'approvisionnait de la papeterie dont on avait besoin pour le département chez différents fournisseurs, et on achetait en détail. Aussi est-il probable qu'on payait le prix, parce qu'il est généralement reconnu que l'on fait payer au gouvernement un peu plus cher qu'aux individus.

Souvent on a discuté l'opportunité d'opérer une réforme, dans le but de réduire la dépense de la papeterie. Il en a été question en 1887, au cours d'un débat dans l'Assemblée Législative. Dans ce débat M. Mercier aurait exprimé l'intention qu'il avait de faire une réforme dans le sens que je viens d'indiquer, et de fonder, pour cela, un bureau central d'où pourrait se faire l'approvisionnement de la papeterie, non seulement pour les départements mais aussi pour tous les bureaux publics sous le contrôle du Gouvernement en dehors de son hôtel, tels que les Cours de Justice de Québec et de Montréal et les bureaux du service extérieur.

Il paraîtrait que l'hon. M. Taillon, alors chef de l'opposition et qui avait été un des membres du Gouvernement qui avait précédé celui de l'hon. M. Mercier, avait lui-même étudié ce sujet et que,

lors du débat en question, il aurait approuvé le projet, et qu'il aurait dit qu'il espérait que le Gouvernement trouverait le moyen d'effectuer une réforme dans ce sens.

C'était, cela, en 1887. Peu après, M. Langlais a commencé des tentatives pour avoir l'approvisionnement de toute la papeterie dont le Gouvernement aurait besoin. Il a fait des propositions à cet effet à M. Mercier. Il l'a vu à plusieurs reprises et il lui a expliqué les avantages que le Gouvernement retirerait de l'adoption du projet; mais néanmoins la chose est restée en suspens. Cependant, en 1887 il avait fait préparer par M. Pelletier un projet de contrat lui donnant l'approvisionnement du papier pour les bâties du Parlement, et il l'avait signé, mais ce contrat n'a jamais été complété par le Gouvernement et il n'a jamais été mis à exécution. Néanmoins M. Langlais a continué à fournir de la papeterie au Gouvernement, et cela en quantités assez considérables, vu qu'il était un des principaux fournisseurs.

En 1891 une élection pour la Chambre des Communes a eu lieu dans le Canada. Les deux défenseurs, hommes importants dans le monde politique, ont pris, comme c'était leur droit, une part très active dans la campagne électorale; et, pendant cette campagne électorale, avant le jour de la votation, M. Langlais, un bon jour,—dimanche, le 22 février 1891,—se rendit chez M. Pacaud pour lui demander son appui, afin d'obtenir le contrat pour l'approvisionnement de la papeterie pour tous les bureaux publics.

Il s'était imaginé que M. Pacaud avait beaucoup d'influence et que peut-être, par son intercession auprès de M. Mercier, il pourrait obtenir le contrat. Il lui exposa les avantages que le Gouvernement en retirerait et il demanda à M. Pacaud de s'intéresser pour lui et de demander à M. Mercier de le lui donner. M. Pacaud lui dit qu'il verrait le Premier Ministre et qu'il pensait qu'il lui donnerait le contrat. Puis il lui dit: "Bien, M. Langlais, si vous avez le contrat, souscrivez-vous quelque chose pour les élections?"

M. Langlais alors lui répondit: "M. Pacaud, je ne veux pas qu'il soit question de cela maintenant." Mais M. Langlais a été interrogé deux fois, une fois ici et une autre fois à l'enquête préliminaire, et il se trouve une différence entre les deux versions qu'il donne de ce qui se serait passé à ce moment.

Lorsqu'il a été examiné devant nous, on a demandé à M. Langlais s'il n'avait pas été question, au cours de cette entrevue avec M. Pacaud, d'un nommé Tourville, comme concurrent pour l'obtention du contrat, et il a répondu qu'il ne s'en rappelait pas,

tandis qu'à l'enquête préliminaire il a dit que M. Pacaud lui avait alors déclaré que M. Tourville serait disposé à prendre le contrat et à souscrire libéralement, et que même il est possible que la somme de \$50,000 ait été mentionnée.

On a demandé ici à M. Langlais s'il n'était pas vrai qu'il avait dit cela à l'enquête préliminaire, et il a répondu qu'il ne s'en souvenait pas. Ensuite, après que la déposition qu'il avait donnée à l'enquête préliminaire devant le magistrat Chauveau lui a été lue, on a demandé à M. Langlais si cette déposition contenait la vérité, et il a répondu qu'elle avait été donnée à une époque plus rapprochée des faits, et que, naturellement, il devait avoir la mémoire plus fraîche à cette époque-là, et il a ajouté que ce qu'il avait juré devant le magistrat Chauveau était la vérité.

Maintenant, précisons. Il a juré que ce qu'il avait dit la première fois est la vérité. La deuxième fois, il a dit qu'il ne se rappelle pas dans le moment certains faits. Vous aurez à décider, après avoir pesé mûrement les deux dépositions, si vous croyez que le nom de M. Tourville et la somme de \$50,000 ont été mentionnés, ou ne l'ont pas été, lors de l'entrevue entre M. Pacaud et M. Langlais le 22 février.

Dans cette entrevue, M. Pacaud a dit qu'il verrait M. Mercier et qu'il rencontrerait ensuite M. Langlais à l'hôtel du gouvernement. Il s'y rendit le lendemain matin et là, en le rencontrant, M. Langlais lui demanda s'il avait vu le Premier Ministre. M. Pacaud répondit qu'il ne l'avait pas vu. On apprit alors que M. Mercier était engagé avec un monsieur de Montréal et qu'on ne pouvait pas le voir dans le moment. Après s'être consultés ensemble, M. Pacaud dit à M. Langlais qu'il valait mieux écrire au Premier Ministre. M. Langlais et M. Pacaud rédigèrent alors une lettre et en passèrent le brouillon à M. Clément, le secrétaire particulier du Premier Ministre, M. Mercier, qui la mit au net, puis la porta à ce dernier.

Cette lettre n'a pas été produite; on ne l'a pas trouvée. Il a été suggéré que jamais telle lettre n'a existé, mais M. Langlais, lui, jure positivement qu'il l'a écrite, et son témoignage n'a pas été contredit.

Peu de temps après, on a remis à M. Langlais la lettre suivante de M. Mercier :

“ J'ai l'honneur de vous informer qu'après en avoir avisé avec
“ mes collègues, je suis autorisé à vous dire que le Gouvernement
“ a décidé de vous accorder, pour l'espace de quatre ans à compter
“ du premier mars prochain, l'approvisionnement de tout le papier

“nécessaire à tous les bureaux publics sous notre contrôle, et
“ordre va être donné incessamment, à cet effet, dans tous les
“bureaux publics, au palais législatif, au bureau du protonotaire,
“celui du shérif et de la cour de police à Québec, et aux bureaux
“du protonotaire, du shérif, au bureau de police, des magistrats
“du district de Montréal. Ordre sera aussi donné aux régistra-
“teurs des différents districts de la province, ainsi qu'aux im-
“primeurs du Gouvernement, d'acheter de vous, à l'avenir, le
“papier portant une marque spéciale. Vous serez payé pour ce
“papier suivant le prix courant.

“Il ne s'agit que du papier nécessaire aux départements et
“aux autres bureaux publics ci-dessus mentionnés, et nullement
“de l'impression de tel papier, laquelle devra se faire où le Gou-
“vernement le désirera.”

En recevant cette lettre, il se consulta avec M. Pacaud, et il lui dit : “Il me faudrait une avance pour exécuter mon contrat.” La-dessus M. Pacaud dit à M. Langlais : “Ecrivez au Premier Ministre.” On a alors rédigé en collaboration une autre lettre, qui a été mise au net par M. Clément et que ce dernier a portée au Premier Ministre. A cette lettre qui demandait une avance, M. Langlais reçut, peu après, la réponse suivante :

“Je viens de recevoir votre lettre, en date de ce jour, me de-
“mandant de vous faciliter les moyens d'obtenir des banques les
“avances nécessaires pour vous permettre l'exécution de votre
“contrat, comportant l'approvisionnement de tout le papier né-
“cessaire aux bureaux publics sous notre contrôle. Je n'ai au-
“cune objection à me rendre à votre désir. Prenant en considé-
“ration l'importance de ce contrat, ainsi que la moyenne des
“sommes payées pour cette fin dans le passé, je puis vous dire
“que le Gouvernement payera, à vous ou à votre ordre, la somme
“de \$30,000 dans six mois de cette date, c'est-à-dire, du 1er mars
“prochain.”

A la réception de cette lettre, M. Langlais déclara à M. Pacaud qu'il ne trouvait pas l'avance de \$30,000 suffisante. M. Pacaud lui répondit : “Ecrivez de nouveau.”

Ils rédigèrent ensemble une seconde lettre, et M. Langlais reçut dans quelques minutes la réponse suivante :

“Je viens de recevoir votre lettre par laquelle vous me dites
“que vous trouvez insuffisante la promesse d'un paiement de
“\$30,000 dans six mois, en acompte sur le contrat, et vous me
“demandez de doubler le montant.

“Je regrette d'avoir à vous dire que je ne puis me rendre à

"votre demande. Dans mon opinion, cette somme de \$30,000 "serait suffisante pour acquitter ce que vous auriez fourni alors "au Gouvernement. Je n'ai pas d'objection, cependant, à vous "dire que le Gouvernement payera, à vous ou à votre ordre, une "somme additionnelle de \$30,000 dans un an à compter du 1er "mars prochain."

Après avoir reçu cette dernière lettre, MM. Langlais et Pacaud partirent et se rendirent dans le bureau du secrétaire particulier de l'hon. M. Garneau. Là M. Langlais fit l'observation à M. Pacaud qu'il n'aimerait pas rembourser cette somme de \$60,000 toute à la fois, mais qu'il désirerait qu'on ne retint que 20 p. c. sur chaque livraison, c'est-à-dire, que sur chaque \$100 qu'il fournirait il désirait qu'il ne fût déduit que \$20, jusqu'à ce que les \$60,000 fussent ainsi remboursées au Gouvernement. Alors M. Pacaud lui dit: "Ecrivez à M. Mercier." M. Langlais écrivit une autre lettre et demanda à M. Pacaud d'aller la porter, et M. Pacaud y alla.

Jusqu'à ce moment, la preuve n'a révélé aucune trace d'une entrevue entre M. Pacaud et M. Mercier au sujet de l'affaire qui nous occupe.

M. Pacaud revint quelques minutes après en disant qu'il avait vu le Premier Ministre, que c'était correct, et que les remboursements se feraient tel que proposé par M. Langlais.

MM. Langlais et Pacaud descendirent alors ensemble à la Caisse d'Economie. On demanda le président, et on reçut la réponse qu'il était à son dîner; alors ils se rendirent chez le Dr. Robitaille. M. Pacaud n'entra pas, mais M. Langlais vit le président de la Caisse d'Economie, le Dr. Robitaille, et il lui demanda s'il serait disposé de lui escompter les deux promesses ou lettres de crédit qu'il avait eues de M. Mercier. Il montra au Dr. Robitaille la lettre accordant le contrat et les deux lettres de crédit.

Le Dr. Robitaille dit: "Nous avons de l'argent en banque et "nous cherchons des placements pour cet argent; nous avons "souvent négocié des documents semblables à ceux que vous me "présentez et nous avons toujours été bien payés; je crois qu'il "n'y a pas de danger, et je vais vous accorder l'escompte que "vous me demandez." Il lui donna alors une petite lettre pour le secrétaire-trésorier de la Caisse d'Economie à cet effet. MM. Langlais et Pacaud retournèrent à la Caisse d'Economie et là le secrétaire-trésorier, M. Marcoux, donna suite à la décision prise par le président d'accorder l'escompte demandé. M. Marcoux déduisit sur les \$60,000 l'intérêt de six mois pour \$30,000 et d'un

an pour les autres \$30,000, et il remit à M. Langlais un chèque pour \$56,772.33, étant le produit net de la transaction.

De là MM. Langlais et Pacaud descendirent à la Basse-Ville. Chemin faisant, M. Pacaud dit à M. Langlais : "Maintenant que vous avez votre argent, M. Langlais : combien allez-vous souscrire pour les élections ?" "Combien demandez-vous ?" répondit M. Langlais. M. Pacaud lui dit : "Vous savez que j'ai la main large ; il me faudrait \$50,000." Sur le champ et sans hésitation M. Langlais répondit : "Vous les aurez."

M. Langlais se dirigea vers la Banque Nationale, où le chèque de \$56,772.33 était payable, mais M. Pacaud lui dit qu'il valait mieux aller à la Banque Union, qu'ils auraient l'argent là comme à la Banque Nationale.

Ils entrèrent à la Banque Union et le payeur compta et paya à M. Langlais, sur le comptoir, le montant de son chèque. M. Langlais prit l'argent, se dirigea de l'autre côté du bureau, où il y avait une table, compta l'argent, remit \$50,000 à M. Pacaud et garda les \$6,772.33 qui restaient.

Il n'y a pas de doute quant à cela ; les avocats de la défense mêmes admettent que M. Pacaud a reçu cette somme de \$50,000.

M. Pacaud prit alors pour lui-même \$25,000 des \$50,000 ; il mit \$500 dans sa poche et déposa \$24,500 à son crédit à la Banque Union, où il avait un compte.

Ce même jour-là une somme de \$25,000 a été transmise à Montréal, pour être placée au crédit de M. Mercier.

Le payeur de la Banque Union, M. Laird, dit qu'il a une connaissance personnelle que les \$25,000 qui ont été transmises à Montréal provenaient des argents payés pour le chèque de \$56,772.33, que ça formait partie de la somme remise à M. Langlais.

L'argent a été transmis ; mais qui a donné l'ordre de l'envoyer ?

Le gérant de la Banque Union dit qu'il ne se rappelle pas d'avoir eu des instructions de M. Pacaud de le transmettre. Le comptable de la banque dit qu'il a reçu l'ordre du gérant de transmettre l'argent en question sur les instructions, lui a-t-il dit, de M. Pacaud, mais M. Pacaud n'était pas présent lorsque le comptable a reçu cet ordre du gérant. Néanmoins le gérant ajoute que si l'argent a été transmis ç'a dû nécessairement être sur l'ordre de M. Pacaud.

Vous aurez à considérer si l'argent qu'on a transmis au crédit de M. Mercier à Montréal provenait de la somme de \$50,000 remise à M. Pacaud par M. Langlais. Ça ne pouvait pas avoir été

envoyé par M. Langlais, car M. Langlais n'avait gardé que \$6,772.33, et avec cette somme il ne pouvait pas envoyer \$25,000.

M. Langlais jure qu'il a remis \$50,000 entre les mains de M. Pacaud, et d'ailleurs, il est admis qu'il les a reçues. M. Laird déclare qu'il a une connaissance personnelle que les \$25,000 transmises au crédit de M. Mercier à Montréal formaient partie de l'argent qu'il avait payé pour le chèque de \$56,772.33.

Vous aurez à tirer une conséquence de ces faits, à dire si cet argent a été envoyé au crédit de M. Mercier à Montréal sans que personne ait donné des instructions à cet effet, ou si les instructions ont été données par M. Pacaud.

L'argent a été transmis à la Banque Union à Montréal, et le lendemain matin, le 24 février, cette banque a déposé les \$25,000 à la banque Jacques-Cartier, au crédit de M. Mercier.

Le lendemain du dépôt, le 25 février, le frère de M. Mercier, M. Joseph A. Mercier, a retiré le dépôt de la banque Jacques-Cartier par deux chèques de \$12,500 chacun; pour cela il s'est servi de deux chèques signés en blanc par l'hon. M. Mercier, que celui-ci lui avait laissés.

Il paraîtrait que depuis longtemps Joseph A. Mercier était l'agent de son frère, que c'était lui qui faisait toutes ses affaires de banque, et qu'au lieu d'agir et de signer le nom de son frère en vertu d'une procuration, l'hon. M. Mercier lui laissait des chèques signés en blanc, et que dans l'occasion en question il s'est servi de deux de ces chèques. Joseph A. Mercier a rempli les deux chèques à son propre ordre, les a endossés, puis les a déposés à son propre crédit, l'un à la Banque du Peuple et l'autre à la Banque Nationale à Montréal. Le même jour, il a tiré sur chacune de ces deux banques un chèque pour \$12,500 et les a remis à M. Geoffrion, qui était le trésorier du fonds électoral du parti libéral à Montréal.

Ces chèques n'ont pas été remis à M. Geoffrion pour des fins personnelles, mais pour des fins politiques, des fins électorales. Il a reçu cette somme de \$25,000 en sa qualité de trésorier du fonds électoral du parti libéral, et on ne sait pas comment l'argent a été employé.

Voilà en peu de mots les faits.

Dans une accusation de conspiration, la preuve de la conspiration peut se faire de deux manières. Elle peut se faire directement ou elle peut se faire par déduction, c'est-à-dire, en prouvant des faits ou des circonstances dont on peut tirer la conclusion qu'il a dû y avoir conspiration. Dans le premier cas la preuve

est une preuve directe et dans l'autre elle est une preuve de circonstances.

Dans ce procès, il n'y a aucune preuve directe de la conspiration dont les défendeurs sont accusés.

Et, en vérité, il est très difficile de faire une preuve directe de conspiration. Une conspiration se trame ordinairement dans l'ombre, et on ne peut en avoir la preuve directe que lorsqu'un tiers a entendu les conversations des conspirateurs, ou quand l'un des conspirateurs se constitue témoin de la couronne.

La preuve d'une conspiration se fait conséquemment d'ordinaire par induction.

Vous aurez maintenant à considérer les faits prouvés dans cette cause et après mûre délibération de dire si oui ou non ces faits vous mènent à la conclusion qu'une conspiration a existé entre les deux défendeurs pour obtenir l'argent, soit du Gouvernement soit de la Caisse d'Economie, et de se l'approprier.

L'acte d'accusation contre les défendeurs comporte, comme je vous l'ai déjà dit, deux chefs.

On porte souvent plusieurs chefs d'accusation pour la même offense, pour s'assurer d'une définition de l'offense qui puisse être conforme à la preuve.

Dans le cas actuel, par le premier chef d'accusation, les deux défendeurs sont accusés d'avoir conspiré pour obtenir et s'approprier la somme de \$60,000 des argents de Sa Majesté, c'est-à-dire, des argents du Gouvernement de la Province de Québec; par le second chef d'accusation, ils sont accusés d'avoir conspiré pour obtenir et s'approprier cette même somme, non du Gouvernement, mais de la Caisse d'Economie de Notre-Dame de Québec.

Dans un procès pour conspiration, le but de la conspiration doit être prouvé tel que mentionné dans l'acte d'accusation ou dans un des chefs d'accusation.

Prenons maintenant le premier chef d'accusation, par lequel les défendeurs sont accusés d'avoir conspiré pour obtenir l'argent du Gouvernement.

Pour que l'on puisse dire qu'il y a eu conspiration à cet effet, il faut d'abord constater s'il est possible d'obtenir, en vertu des documents produits, l'argent du Gouvernement, et ensuite déduire des circonstances et de ces documents qu'il y avait concert et entente entre les accusés pour s'approprier ou pour tenter de s'approprier de l'argent appartenant au Gouvernement.

S'il y a eu conspiration pour s'approprier ou pour tenter de s'approprier l'argent du Gouvernement de la Province de Québec,

g'a dû être au moyen de la lettre du Premier Ministre déclarant qu'il accordait à M. Langlais le contrat pour l'approvisionnement de la papeterie, et des deux lettres par lesquelles il promettait que deux sommes de \$30,000 seraient payées, l'une dans six mois et l'autre dans un an.

Il faut donc voir s'il est possible de s'approprier, au moyen de ces documents-là, l'argent du Gouvernement.

Pour le faire, il faudrait que ces documents aient une force juridique, un effet légal qui obligerait et forcerait le Gouvernement de payer les sommes y-mentionnées.

Ces documents sont signés par M. Mercier seul, agissant, il est vrai, comme Premier Ministre ; il a même signé après en avoir donné connaissance à ses collègues, mais le consentement du Lieutenant-Gouverneur comme le représentant de la Couronne, n'a été ni obtenu ni même demandé.

Or, nous vivons ici sous une monarchie. Le peuple a ses droits, mais la souveraine a aussi ses prérogatives. La Reine, représentée par le Lieutenant-Gouverneur, doit voir à ce que les affaires publiques, qui sont conduites en son nom, soient administrées pour l'avantage du peuple, et son représentant a le droit, en son nom, de donner ou de refuser son concours aux actes de ses ministres. Le Lieutenant-Gouverneur doit agir suivant l'avis de ses ministres ; mais pour lier le Gouvernement il faut de toute nécessité son consentement.

Or, pour qu'un contrat du Gouvernement soit valable, il faut, non seulement qu'il soit fait sur l'avis des ministres de la Couronne, mais aussi que le représentant de la Couronne y consente et que ce concours de volonté soit manifesté par un ordre en conseil.

Il y a, néanmoins, certaines choses que les ministres peuvent faire sans consulter le Lieutenant-Gouverneur ; mais c'est parce qu'il y a pour ces cas-là des statuts qui y pourvoient, et, comme ils ont reçu la sanction royale, la Couronne a consenti d'avance aux actes qu'on pourrait faire en vertu de ces statuts.

Par exemple, le Commissaire des Terres de la Couronne, en vertu des statuts qui régissent son département, peut vendre les terres publiques ; il n'est donc pas nécessaire, chaque fois qu'il vend un morceau de terre, qu'il obtienne le consentement de la Couronne.

De même, chaque ministre est chargé du contrôle et de l'administration de son département. Par conséquent, il a le droit de

faire les contrats qui concernent l'administration de son département.

Dans l'affaire qui nous occupe, le contrat ne concerne pas qu'un seul département, mais regarde tous les départements. Or, aucun département n'est subordonné à un autre, et le droit d'administration d'un ministre est restreint à son propre département; et, conséquemment, pour qu'un contrat s'applique à tous les départements, il faut qu'il émane du Lieutenant-Gouverneur en Conseil et qu'il repose sur un ordre en conseil.

Ce qu'on appelle le contrat, c'est-à-dire, la lettre adressée par M. Mercier à M. Langlais, lui accordant l'approvisionnement de la papeterie, et les lettres promettant de payer d'abord \$30,000 dans six mois et ensuite \$30,000 dans douze mois, n'ont jamais été approuvées par le Lieutenant-Gouverneur, et ne sont pas basées sur un ordre en conseil; et ils n'ont, par conséquent, aucune force juridique. On ne peut donc pas exiger du Gouvernement de la Province de Québec le paiement d'aucun argent en vertu de ces documents.

Il est de mon ressort de vous expliquer la loi dont la connaissance est nécessaire pour l'appréciation des faits de la cause; je vous dis donc que ces documents n'engagent aucunement le Gouvernement, et vous êtes obligés d'accepter cette énonciation de la loi pour votre gouverne.

On peut avoir des soupçons que les défenseurs ont machiné et ont fait ces documents avec l'intention de s'approprier, ou de tenter de s'approprier, de l'argent du Gouvernement, mais pour juger il nous faut non des soupçons mais une preuve légale, capable de produire sur notre esprit la conviction.

Maintenant, il appert à la face même des deux lettres de crédit, que leur but était de "faciliter les moyens d'obtenir des banques des avances." En l'absence de toute preuve directe de conspiration, les jurés doivent inférer des circonstances et des faits prouvés s'il y a eu conspiration ou non. Tel étant le cas, pouvons-nous conclure des faits et des circonstances de cette cause, qu'il y a eu conspiration pour frauder le Gouvernement de la Province de Québec de la somme de \$60,000?

Pour frauder le Gouvernement, il aurait fallu que les documents fussent valables, qu'on eut pu forcer le Gouvernement à payer les sommes y-mentionnées, et peut-on dire que le but des accusés était de s'approprier, ou de tenter de s'approprier, l'argent du Gouvernement, quand l'intention avouée des lettres de crédit est d'obtenir de l'argent des banques, et qu'il est prouvé que, de

fait, de l'argent a été obtenu sur les documents en question de la Caisse d'Economie ?

Je ne crois pas qu'on puisse conclure, dans les circonstances, que les défendeurs ont conspiré pour frauder Sa Majesté, et que l'on puisse dire que le but de la conspiration soit légalement prouvé tel que porté dans le premier chef d'accusation. Si, dans l'appréciation de la preuve, vous êtes de mon avis, il ne vous sera pas nécessaire de vous occuper davantage de ce premier chef, et vous devez l'écarter.

Il nous reste, maintenant, le deuxième chef d'accusation, par lequel on accuse les défendeurs d'avoir conspiré pour obtenir, d'une manière frauduleuse et par de faux prétextes, cette somme de \$60,000 de la Caisse d'Economie.

C'est prouvé clairement que le Dr. Robitaille, croyant que les documents qu'on lui présentait étaient valables, a escompté les deux lettres de crédit, et que la Caisse d'Economie a payé à M. Langlais le produit de la somme de \$60,000, soit \$56,772.33.

La question est de savoir si les défendeurs ont conspiré pour obtenir cet argent de la Caisse d'Economie et se l'approprier.

C'est à vous à décider si, d'après la preuve faite, vous pouvez dire que les deux défendeurs ont conspiré ensemble pour atteindre ce but. Y a-t-il eu complot entre M. Mercier et M. Pacaud pour obtenir de la Caisse d'Economie la somme de \$60,000 au moyen des documents en question et en se servant de M. Langlais comme intermédiaire ?

Si, dans une accusation de conspiration, deux personnes paraissent avoir poursuivi le même but par les mêmes moyens, l'une d'elles ayant fait une partie et l'autre ayant complété le reste des actes nécessaires pour atteindre ce but, le jury peut de là tirer la conséquence qu'il y a eu conspiration. Ici, M. Pacaud a rédigé la demande des lettres de crédit et M. Mercier les lui a fait parvenir tout de suite ; M. Pacaud a reçu les fonds et une partie de l'argent a été déposée au crédit de M. Mercier à Montréal et a été retirée par son procureur. Pouvez-vous inférer de cela qu'il y ait eu concert entre les défendeurs,—conspiration ? C'est à vous à peser mûrement ces faits et à vous prononcer.

Si vous trouvez la preuve suffisante pour vous permettre de déclarer que les défendeurs ont conspiré ensemble, vous devrez, dans ce cas, les déclarer coupables ; mais si vous ne pouvez pas arriver à cette conclusion, si vous ne pouvez pas dire consciencieusement que l'affaire a dû avoir lieu par le concert et l'entente

des deux défendeurs, il faudra nécessairement dire qu'ils ne sont pas coupables.

Mais si vous croyez qu'il y a eu conspiration entre M. Pacaud et M. Langlais pour se procurer cet argent afin de souscrire au fonds électoral, cela ne vous suffira pas pour déclarer que les deux défendeurs, M. Mercier et M. Pacaud, sont coupables.

Dans une accusation de conspiration, il faut que deux, au moins, soient coupables. Vous ne pouvez pas dire que l'un des deux est coupable et que l'autre est innocent, parce qu'un seul ne peut pas conspirer; il faut être deux, au moins, pour conspirer. Par conséquent, pour prononcer un verdict de culpabilité, il faut que vous soyez convaincus que M. Pacaud et M. Mercier ont eu des rapports ensemble, se sont concertés ensemble dans le but d'obtenir et de s'approprier l'argent de la Caisse d'Economie.

L'accusation est qu'ils ont comploté pour obtenir et s'approprier cet argent; ce qu'ils ont pu faire de l'argent ne peut changer la nature de l'offense.

Si quelqu'un vole votre argent, quelque soit l'usage qu'il puisse en faire, qu'il le dépense pour ses affaires ou pour ses plaisirs, ou qu'il l'emploie pour une œuvre de charité, il sera toujours coupable de vol. L'emploi qu'il peut faire de l'argent volé ne change pas la nature de son offense.

Si, dans ce cas-ci, les défendeurs se sont approprié l'argent, non pas pour l'employer à leurs propres affaires, mais pour l'employer à des fins d'élection; cela ne change nullement la nature de l'offense,—si vous arrivez à la conclusion qu'il y a eu conspiration.

L'accusation est que les deux défendeurs ont conspiré; et par conséquent la preuve d'une conspiration entre M. Pacaud et M. Langlais, qui n'est pas accusé, ne concorde pas avec l'acte d'accusation; et la conspiration ne serait pas prouvée pour les fins de cette cause. Quand bien même M. Pacaud serait coupable d'avoir conspiré avec une autre personne, et que la preuve en serait faite dans le procès qui nous occupe maintenant, il faudrait le déclarer non coupable, car il n'est pas accusé de cela, et pour rendre un verdict de culpabilité dans la présente cause il faut que vous soyez convaincus que les deux défendeurs ont conspiré ensemble.

Vous aurez à considérer toute la preuve pour voir si vous pouvez y trouver les indices d'une conspiration.

Si la preuve vous conduit à la conclusion qu'il existait un concert ou une entente, c'est-à-dire, un complot ou une conspiration entre les deux défendeurs, il sera de votre devoir de dire qu'ils sont coupables, quelles qu'en soient les conséquences.

Si, d'un autre côté, vous croyez qu'il n'y a pas eu de complot ou de conspiration, vous devrez dire qu'ils ne sont pas coupables. Si vous avez un doute sérieux, pas un doute créé par le désir de prononcer un acquittement, mais un doute tellement sérieux que plus tard, lorsque vous serez appelé à rendre compte de votre conduite en ce monde, vous auriez à vous reprocher de l'avoir mis de côté pour rendre un verdict de culpabilité, si vous avez un doute tellement grave que vous ne pouvez déclarer que vous êtes convaincus, en votre conscience, qu'il y a eu conspiration, vous devrez, dans ce cas, donner le bénéfice du doute aux défenseurs.

Je regrette de vous avoir retenus aussi longtemps, mais j'étais tenu de vous donner les explications que je croyais nécessaires pour vous mettre en état de rendre un verdict honnête et vrai.

Je m'en rapporte à vous maintenant pour étudier et considérer soigneusement tous les faits de la preuve, mettant de côté toute passion politique, considérant les choses simplement au point de vue de la preuve, avec calme et sans vous laisser influencer par les éloquentes paroles des avocats qui doivent résonner encore dans vos oreilles. Si je me suis trompé dans le résumé que je viens de vous faire de la preuve, vous devrez ne pas accepter mon récit des faits, mais vous en rapporter entièrement à votre propre souvenir des témoignages qui ont été rendus.

Maintenant, retirez-vous pour délibérer. Agissez sans partialité et faites votre devoir sans crainte.

M. FITZPATRICK.—Votre Honneur aura-t-il la complaisance de répéter en français les dernières remarques qui ont été faites en anglais, à la fin de votre charge, en rapport avec l'avis du dépôt de \$25,000 au compte de M. Mercier ?

LE JUGE WURTELE.—On me demande de répéter en français les quelques paroles que j'ai ajoutées à ma charge en Anglais. Voici :

Il appert du témoignage de M. DeMartigny que la Banque Jacques-Cartier n'aurait pas notifié M. Mercier qu'une somme de \$25,000 avait été mise à son crédit. Vous aurez à vous rendre compte comment M. Joseph A. Mercier a pu savoir la chose.

M. Joseph A. Mercier a aussi déclaré que son frère, l'Hon. M. Mercier, n'a pas eu connaissance du dépôt de la somme de \$25,000 à la Banque Jacques-Cartier, ni du fait que cette somme avait été remise à M. Geoffrion.

Vous aurez à considérer la preuve de la défense aussi bien que celle de la Couronne, et de décider la portée et l'importance qu'elle doit avoir.

Je remets la cause entre vos mains, en toute confiance, convaincu que vous vous efforcerez, comme je l'ai fait, de rendre justice aux parties.

(Verdict—Not guilty. Nov. 4, 1892).

EXCHEQUER COURT OF CANADA.

OTTAWA, Jan. 9, 1893.

Coram BURBIDGE, J.

BULMER v. THE QUEEN.

Crown domain—Disputed Territory—License to cut timber—Implied warranty of title—Breach of contract—Damages.

By the 50th section of the Dominion Lands Act, 1883, it is provided that leases of timber berths shall be for a term of one year, and that the lessee shall not be held to have any claim whatsoever to a renewal of his lease unless such renewal is provided for in the Order-in-Council authorizing it, or embodied in the conditions of sale or tender. The Orders-in-Council in question in this case authorized the issue of leases subject to the terms of the regulations of March 8, 1883, by which it was provided that under certain conditions, existing in this case, the Minister of the Interior might renew such license. From the Orders-in-Council and the character of the several transactions, it appeared to be the intention of the parties that the license should be renewable.

Held, that such renewals were provided for within the meaning of the Statute.

When the Crown agrees to issue a lease or license to cut timber on public lands it agrees to grant a valid lease or license, and a contract for title to such lands is to be implied from such agreement. Not only the word "demise" but the word "let," or any equivalent words which constitute a lease create, it appears, an implied covenant for quiet enjoyment. *Hart v. Windsor*, (12 M. & W. 85.) *Mostyn v. The West Mostyn Coal and Iron Company*, (L. R., 1 C. P. D. 152), referred to. But *quaere* if the rule is applicable to a Crown lease?

Queen v. Robertson, (6 S. C. R. 52), referred to.

To the general rule as to the measure of damages for the breach of a contract there is an exception as well established as the rule itself, namely, that upon a contract for the sale and purchase of real estate, if the vendor, without fraud, is incapable of making a

good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain v. Fothergill*, (L. R., 7 H. L. 158). *Flureau v. Thornhill*, (2 Wm. Bl. 1078), referred to.

This exceptional rule is confined to cases of contract for the sale of lands or an interest therein, and does not apply where the conveyance has been executed, and the purchaser has entered under covenants express or implied for good title or for quiet enjoyment. *Williams v. Burrell*, (1 C. B. 402); *Lock v. Furze*, (L. R., 1 C. P. 441), referred to.

The authorities are not agreed, but it is probable that this exceptional rule as to the measure of damages for the breach of a contract of sale of real estate does not apply where the vendor is able to make a good title and refuses or wilfully neglects to do so. *Engel v. Fitch*, (L. R., 3 Q. B. 314); *Robertson v. Dumaresq*, (2 Moore, P. C. N. S. 84, 95), referred to.

An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon, is an agreement in respect to an interest in land, and not merely a sale of goods.

The claimant applied to the Government of Canada for licenses to cut timber on certain timber berths situated in the Territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys, and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, and consequently they could not carry out their promises.

Held, that the claimant was entitled to recover from the Government the moneys paid to them for ground rents and bonuses, but not the losses incurred in making the surveys, enlarging the mill, and other preparations for carrying on his business.

Solicitor for claimant: *A. Ferguson*.

Solicitors for respondent: *O'Connor, Hogg & Balderson*.

OTTAWA, NOV. 4, 1892.

Coram BURBIDGE, J.

CORPORATION OF THE CITY OF QUEBEC, Suppliants; and
THE QUEEN, Respondent.

Injury to Property on a Public Work—Negligence of Crown's Officer or Servant—50-51 Vic., c. 16, s. 16 (c)—Liability—Remedy.

The Crown is liable for an injury to property on a public work, occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in *The Exchequer Court Act*, sec. 16 (c), but has its origin in the earlier statute, 33 Vic., c. 23.

2. Prior to 1887, when *The Exchequer Court Act* was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the official arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court and thence to the Supreme Court of Canada.

3. No officer of the Crown has any duty to repair or add to a public work at his own expense, or unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shown that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof.

The Sanitary Commissioners of Gibraltar v. Orfila, 15 App., Cas. 400, referred to.

The injury complained of by the suppliant was caused by the falling of a part of the rock or cliff below the King's Bastion, at the citadel in Quebec in the year 1889. The falling of the rock was caused or hastened by the discharge, into a crevice of the rock, of water from a defective drain, constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain and of the defect was not known to any officer of

the latter Government, and was not discovered until after the accident, when a careful enquiry was made. In the year 1880 an examination of the premises had been made by careful and capable engineers, one of whom was the City Engineer of Quebec, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a natural discharge from the cleavages or cracks in the cliff itself.

Held, that there was no negligence on the part of any officer of the Crown, in being and remaining ignorant of the existence of this drain and the defect in it.

Quære, whether the place where the accident happened was part of a public work?

Semble, the Crown may be liable although the injury complained of does not actually occur on, i.e. within the limits of, a public work.

Solicitors for the suppliants: *Baillairge & Pelletier*.

Solicitors for the respondent: *O'Connor, Hogg & Balderson*.

OTTAWA, Nov. 11, 1892.

Coram BURBIDGE, J.

TANCRÈDE DUBÉ, Suppliant; and THE QUEEN, Respondent.

Petition of right—Damages sustained by an accident on a Government railway—Burden of proof—Latent defect in axle of car—Undue speed in passing sharp curve.

On the trial of a petition for damages for injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *prima facie* case of negligence.

The immediate cause of the accident was the breaking of an axle that was defective. It was shown, however, that great care had been used in its selection, and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before

the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too fast a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was

Held, that a case of negligence was not made out.

Solicitor for suppliant: *P. A. Choquette*.

Solicitors for respondent: *O'Connor, Hogg & Balderson*.

OTTAWA, Jan. 9, 1893.

Coram BURBIDGE, J.

THE AURORA (BERGMAN).

Maritime law—Master's lien—Inland waters—R. S. C. cc. 74 and 75—The Colonial Courts of Admiralty Act, 1890—The Admiralty Act, 1891—Cons'ruction.

The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg had, in the years 1888, 1889 and 1890, no lien upon the vessel for wages earned by him as such master.

Even if such a lien were held to exist there was in the years mentioned no Court in the Province of Manitoba in which it could have been enforced, and it could not now be enforced under *The Colonial Courts of Admiralty Act, 1890* (53-54 Vic. (U. K.) c. 27), or *The Admiralty Act, 1891* (54-55 Vic. (Can.) c. 29), because to give those statutes a retroactive effect in such a case as this would be an interference with the rights of the parties.

Wade & Wheeler for plaintiff.

Mather for liquidators.

Darby for creditors.

RECENT ONTARIO DECISIONS.

Railway Company—Ticket—Contract—Condition—Damages—“Via direct line.”

A condition in a railway ticket as to travelling “*via direct line*” was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others.—*Dancy v. Grand Trunk R. Co.*, Court of Appeal, Nov. 8, 1892.

Railway Company—Damages—Limitations—51 Vic. (D.) c. 29, s. 287.

The plaintiff's father was killed on the 10th February, 1891, by a fall from a bridge which crossed the defendant's line, and had been negligently allowed by them to be out of repair. The action was begun on the 10th December, 1891.

Held, that this was not "damage sustained by reason of the railway," and that the limitation clauses of the Railway Act did not apply.—*Zimmer v. Grand Trunk R. Co.*, Court of Appeal, Nov. 8, 1892.

Dominion Winding up Act, s. 56—Dominion and Provincial laws—Claim under Quebec law.

Held, that there is nothing in s. 56 of the Dominion Winding-up Act which alters or interferes with the *lex loci contractus*; and therefore, in the case of a lease entered into in Montreal, where the Quebec law provided that on the insolvency of the lessee, the rent not yet exigible by the terms of the lease should become so by reason of the insolvency of the tenant, a claim for the whole rent to the end of the term must be allowed to the lessors in the liquidation proceedings which were being carried on under the Dominion statute.—*In re Harte & The Ontario Express & Transportation Co.*, Queen's Bench Division, Robertson, J., Sept. 24, 1892.

Constitutional law—Forgery—Summary trial by police magistrates—Ultra vires.

Procedure in criminal matters, which by the B. N. A. Act is assigned exclusively to the Parliament of Canada, includes the trial and punishment of the offender; and therefore s. 2 of 53 Vic. c. 18 (O.), authorizing police magistrates to try and convict persons charged with forgery, is *ultra vires* of a provincial legislature.—*Reg. v. Toland*, in chambers, MacMahon, J., July 28, 1892.

Railway Company—Railway carrying goods through other railways as agents—Loss of goods on agent line—Liability of principal railway company.

Action to recover the value of certain goods. Evans, the purchaser of the goods in question in British Columbia, having the right to name the mode of transit, arranged with Blackwood, the

defendants' agent there, that they should be forwarded by the Grand Trunk Railway and the Chicago & Northwestern Railway, to the defendants' care in St. Paul. The order to this effect having been forwarded by Blackwood to Belcher, the defendants' agent in Toronto, was by him forwarded to the plaintiffs with a request that they would ship the goods, marked in the prescribed manner, and the plaintiffs did as directed.

Held, that the defendants must be taken to have received the goods by their agents the Grand Trunk Railway Company upon a contract to carry them and deliver them safely to the order of the consignee at Victoria, B.C. This contract was broken by their delivering the goods to a person other than the consignee; and the plaintiffs, having thus lost the value of the goods, were entitled to recover.—*Grant v. Northern Pacific R. Co.*, Chancery Division, Nov. 16, 1892.

GENERAL NOTES.

PUBLICANS' PARLOURS AND MUSIC.—The question was raised at Accrington as to the right of a publican to permit singing on his premises without having a music license. The justices thought that if a landlord permitted pianoforte playing and singing as an additional attraction, although he did not pay for the latter, he ought to take out a license. The justices considered that the case came within a recent Act, and, this being a test case, they inflicted a nominal penalty of 5s. and costs. Notice of appeal was given.

JUDGE ADVOCATE-GENERAL.—The office of Judge Advocate-General has, pending future arrangements, been offered to and accepted by Sir Francis H. Jeune, President of the Probate, Divorce, and Admiralty Division. The office was some years ago held, for a period, by Sir Robert Phillimore, when judge of the Court of Admiralty. The duties connected with the office are wholly unpolitical, and it is at present without a salary.

SECURITY OF DEBENTURE-HOLDERS.—The decision of Mr. Justice Stirling in *Folliott v. The Eddystone Granite Quarries (Lim.)*, 61 Law J. Rep. Chanc. 567, is of considerable interest to debenture-holders. The conditions under which the debentures in that case were issued constituted them a first charge on the company's property, but gave certain powers to the debenture-holders in general meeting, at which a majority could bind a dissentient minority, including a power 'to sanction any modification or compromise of the rights of the debenture-holders against the company or its property.' The company afterwards obtained a loan to answer pressing demands, for securing payment of which as a first charge on the company's property they obtained the consent of the necessary majority of the debenture-holders to

postpone their security, and Mr. Justice Stirling held that the postponement was effectual and binding on a dissentient minority, having regard to the power to which we have referred, being a 'modification' or 'compromise' of their rights. Mr. Justice Chitty seems to have arrived at a similar conclusion in *In re The Dominion of Canada Freehold Company (Lim.)*, 55 L. T. (N.S.) 347, on the construction of the trust-deed in that case. Intending investors in so-called 'first debentures', would do well to study the conditions of the debentures or trust-deed in this respect, as the power is one which may seriously affect the value of the security, and lead to some embarrassment when the debentures happen to be held by trustees.—*Law Journal*, (London.)

DISPOSAL OF CONVICTS' ESTATES IN ENGLAND.—The *London Law Journal* refers to Neill as the greatest criminal of the century, and adds:—"Neill is said to have made a will. This document will, we imagine, be inoperative by virtue of the Abolition of Forfeiture Act, 1870 (33 & 34 Vict. c. 23), by which the Crown may appoint administrators of the property of any convict, including in that term a convict under sentence of death: though the Act does not expressly provide for the case of a convict on whom the capital sentence has been carried out, nor does it expressly nullify any will of such convict. The administrators may (out of the property of the convict) pay the costs of his prosecution, defray his debts, and pay compensation to persons injured by his criminal acts, and 'may also cause such payments and allowances for the support and maintenance of any wife or child or reputed child' of the convict, 'or of any other relative, or reputed relative of such dependent upon him for support.'"

ENGAGEMENT RINGS.—We are disposed to query the correctness of the reported *obiter dictum* of Mr. Plowden in a recent Police Court case, to the effect that an engagement-ring is an absolute gift by one of the engaged parties to the other, and not a conditional one upon the marriage contracted for being solemnised. It was said by Lord Hardwicke more than a hundred years ago, in *Robinson v. Cumming*, 2 Atk. 408, that wedding presents made in contemplation of a marriage that does not take place ought to be returned, and there is some ground for saying that such presents would be recoverable as 'gifts upon a condition subsequent not fulfilled' (see 'Chitty on Contracts,' 12th edit. p. 622). We cannot see any valid distinction in the law between the gift of an engagement-ring and a wedding present, and we believe that the usual custom is for the donees of such rings to return them to the donors on breaking off engagements to marry.—*Law Journal* (London).

PREROGATIVE OF THE CROWN.—In *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, reported in the *Law Journal Reports* for December, it was decided by the Privy Council that the prerogative of the Crown, when not expressly limited by local law or statute, is as extensive in the colonial possessions of the Crown as in Great Britain.

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CURRENT TOPICS AND CASES.

By 49-50 Vic., c 34, s. 94, as reproduced in 3597 R. S. Q., it was expressly enacted by the Quebec Legislature that "advocates are entitled to fees and remuneration for their professional services. Amongst the professional services for which fees and remuneration may be charged are included: travelling, attendance, written and verbal consultations, and the examination of papers and documents." This was a positive declaration of the law which had previously been somewhat unsettled. In the recent case of *Christin & Lacoste*, decided by the Court of Appeal, at Montreal, Jan. 26, 1893, it was contended that for services specifically mentioned in the tariff the advocate is governed by its provisions, even in adjusting his account with his own client. The Court did not entertain this view, but held, in the words of Mr. Justice Hall who delivered the judgment, "that the tariff was never intended to regulate the adjustment of the attorney's claims against his own client, but only the successful litigant's claim, either in his own name or that of his attorney, against the losing party." The advocate, therefore, is now in a position to sue and recover judgment against the client who has employed him, for the proved value of his professional services, irrespective of the tariff. The Court concedes that in the absence of a special agreement between advocate and client there is a presumption

that the tariff shall govern, but holds that this presumption may be rebutted by evidence as to the unusual or unexpected importance or duration of the litigation.

Another important decision rendered by the Court of Appeal at Montreal, on the same day, was that pronounced in the case of *Reid & McFarlane*. This judgment is remarkable as it reverses the ruling of the same Court, three years ago, in the case of *Davie & Sylvestre*, M. L. R., 5 Q. B. 143; nay, more, it reverses the decision of the Court pronounced two years previously in *McFarlane & Fatt* (M. L. R., 6 Q. B. 251) on the same agreement which the Court was called upon to construe in *Reid & McFarlane*. An English judge, when a case of *Brown v. Robinson* was cited before him in argument, informed the counsel that he should not feel himself bound by that case unless a suit were before him in which the facts were precisely similar; indeed, added his lordship, "unless the plaintiff's name were Brown and the defendant's Robinson." Our Court of Appeal has hardly paid as much regard to precedent as the learned judge above referred to, for in a case turning upon the same agreement, the facts being exactly the same and one of the parties the same, it has declined to follow its own decision of two years ago. Of course, the composition of the Court is changed, the judges, with one exception (Mr. Justice Baby), being different, and he entered a dissent. The ground on which the Court overruled the precedents referred to was, that in the first case, *Davie & Sylvestre*, the Court had been misled by an incorrect appreciation of the decision of the Privy Council in *Singleton & Knight*, 11 L. N. 401, and that in the subsequent case of *McFarlane & Fatt* the Court had merely followed the precedent of *Davie & Sylvestre*, without any special examination of the facts of the case. In *Davie & Sylvestre* the Court laid down the broad rule that participation in profits makes the person participating liable as a partner to third parties, creditors of the person in whose name the

business is carried on. The facts in *Reid & McFarlane* were hardly so favorable to the person sought to be held liable as in the *Davie* case. McFarlane advanced moneys to one Nowell ; each was to draw the same sum, monthly, from the business, and at the end of the year the profits were to be equally divided between them. McFarlane was to act as manager. The principal circumstance which negatived the existence of a partnership was that the business was not only carried on in the same name as before, but McFarlane's name appeared on the bill and letter-heads as manager. The Court of Appeal, in an elaborate judgment pronounced by the Chief Justice, holds that the first consideration is the intention of the parties, and that if they did not intend to form a partnership an arrangement for sharing profits will not make them liable to third persons, unless their acts have been such as to lead third persons to suppose that a partnership existed. "La participation dans les profits," observed the Chief Justice, "ne constitue donc pas à elle seule le contrat de société ; il faut y trouver les autres éléments essentiels de la société, savoir l'apport pour le bénéfice commun et l'intention des parties de former une société, et ceci s'applique aux tiers créanciers tout aussi bien qu'aux parties entr'elles, car un contrat ne peut être un bail, un louage ou un prêt entre les parties et en même temps une société vis-a-vis des tiers. Ce qu'une cour a d'abord à déterminer c'est la nature du contrat des parties *inter se*. Si elle arrive à la conclusion que c'est une société, les créanciers auront un recours. Dans le cas contraire ils en seront privés. En cela il n'y a pas d'injustice, comme dit Alauzet, Société, No. 376. Si le nom du créancier est resté inconnu des tiers, si ceux-ci n'ont pas contracté avec le commerçant débiteur sous la foi de la responsabilité du prêteur, si même ils ont eu connaissance du prêt qui a été fait, mais qu'ils n'aient jamais considéré le bailleur de fonds comme associé ; qu'importe les conditions du contrat ? La convention des parties doit déterminer leur position respective, et s'il n'y a pas société tout recours

sera refusé aux tiers contre le bailleur de fonds à moins que celui-ci ne se soit donné à eux comme associé. Sa responsabilité dans ce cas découle d'une autre source. Les tiers ne connaissent pas ce qui a été convenu entre les parties. Le contrat de société est consensuel et ne requiert pas d'écrit. Si donc une personne agit comme si elle était associée ou si elle contracte avec des tiers en cette qualité, si par sa conduite elle induit le public en erreur et encourage ainsi un crédit ou des avances qui n'auraient peut-être pas été fournis sans cela, il y aura quasi société ou société, vis-a-vis des tiers, indépendante du contrat réel, qui la liera vis-à-vis d'eux. C'est ainsi que les tiers seront protégés. Nous avons un exemple de cette responsabilité dans l'art. 1900 de notre Code."

The question as to the arrears of the Law Reports for 1892, referred to last month, has been settled by the cancellation of the contract, the printer having failed to proceed with the work for want of paper on which to print the pages standing in type. The work will therefore be taken up by the printers who have the contract for the current year. This difficulty has unfortunately caused much delay, and a good deal of work has had to be done over again. It is expected that the printers will now soon be in a position to resume the issue of the publication.

THE CANADIAN CRIMINAL CODE.

OTTAWA, 20th January, 1893.

DEAR SIR,—

Having been informed, on reliable authority, that amendments to the criminal code passed at the last session of Parliament are to be introduced at the next session, I take the liberty to send you a memorandum of the changes which should, in my humble opinion, be made thereto, before it is allowed to come into force.

It was a self evident proposition, one which no one will controvert, that the Chief Justice of England laid down, in re-

ference to an akin measure presented to the Imperial House of Commons in 1875, when he said :—" I think that any attempt " at codification which is either partial or incomplete can only " be productive of confusion and mischief," or, as he put it, in other words, in 1879, in reference to another one of the same import : " It is of the very essence of a perfect code, that it shall " contain and provide for whatever it is intended shall be the law " at the date of its formation, so that both those who have to administer the law, whether in its preliminary or after stages, " and those who have to obey it should have it before them as a " whole, without having to search for it in Acts of Parliament " scattered over the statute book, and which most persons, at " least so far as the laity are concerned, are ignorant of and know " not where to find. The main purpose of the codification of the " law is utterly defeated by leaving the code to be supplemented " by reference to statutes, and what is still worse, to parts of " statutes which are still to remain in force, but are not embodied " in it."

Now, sir, as you are aware, the draft code, upon which the Lord Chief Justice made these observations, was found to be so defective, as well for incompleteness, as for other reasons, that it had to be dropped in 1880 by the Attorney-General, and has never been adopted into law by the Imperial Parliament.

That our code of 1892 is deficient, in respect of completeness, to a still greater degree than that one in reference to which the Lord Chief Justice so expressed his views on the essential requisites of a codification, must, it seems to me, be conceded, when it is taken into consideration that, whilst the latter superseded all the common law, the former leaves all of it in force, with, besides, a number of important enactments, scattered all over the statute book. So that, in future, any one desirous of ascertaining what is, on a given point, the criminal law of the country will have to refer first, to the common law, secondly, to our unrepealed statutory law, thirdly, to the case law, fourthly, to the Imperial special statutory enactments on the subject in force in Canada, not even alluded to in the code, and fifthly, to the code. I shall not attempt to here enter into details on what, to anyone at all conversant with the subject, appears *on the face of the record*. I have, however, called more particularly your attention to the annexed memorandum to a few of these *lacunæ*, which, in my opinion, must prove hereafter to detract so much from the usefulness of this legislation. They are those which more particu-

larly struck my mind in a preliminary survey I have made of its contents, in view of a third edition of my book on criminal law adapted to it, which, under pressing solicitations from Bench and Bar, from all parts of the Dominion, I have undertaken to prepare.

To cite here a few instances, under this head of omissions, I may more particularly allude to the following offences, which I have not been able to find treated of anywhere; negligent escape, compounding felonies, or offences generally, abortive inciting to commit any of the offences provided for by the code, one maiming himself, either to increase his chances at begging, or to avoid military service, champerty, malfesance, or culpable nonfesance of a public officer in relation to his office; extortion, and bribery, generally; various statutory indictable crimes, the number of which I have not ascertained; conspiracy to commit an unlawful, not indictable, act.

Then, as to accessories before the fact, I find that though sec. 63 defines what is an accessory after the fact, what is an accessory before the fact is nowhere to be found. The very name has disappeared from the law, even in the index.

Those who know the law on the subject can see that sec. 61 is given as a re-enactment of it in a different shape, but for those who, in their studies, finding the expression as one known at common law, in every book, desire to ascertain what it is in the code, it is putting obvious difficulties in their way, not to, at least, keep the name in the marginal note, or sub-title; the same may be said as to aiders and abettors. Then, not a word is to be found of the rule, "*actus non facit reum nisi mens sit rea*," nor of the cognate rule, as to intent, that the law of England judges not of the fact by the intent, but of the intent by the fact; nor of the law, in criminal cases, of principal and agent, or master and servant, nor of the rules on consent, waiver, or estoppel in such cases; neither of the law as to contributory negligence in manslaughter.

Another class of omissions is such as follows, and there are many of them. A man steals ten sheep at the same time. Can he be indicted ten times, one accusation for each? "Yes," says Lord Hale, "for thus it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time."—But then if a man steals, say ten sovereigns, can he be indicted ten times? or twice, if five of the sovereigns belong to A., and

five to B?—A. kills B. and C. by one shot. Has he committed two murders, or one murder of two men? Why not provide for such cases and say that one act constitutes only one crime, the quantity, etc., being only a matter of aggravation, or settle it, in some way or other? Persecution, in the guise of prosecution in the public interest, should not be tolerated. Such questions, it must be assumed, have been discussed by the special committee, but there is not a word of them in the code.

A third class of omissions to which I may here more especially allude is that of the Imperial Statutory enactments in force in Canada. I beg leave to refer you, for a few instances thereon, to my note under section 640 as to such of those that have come to my mind. Allow me, also, to call your attention to the fact that section 542 bears the construction that our Parliament has assumed jurisdiction on offences committed by a *foreigner*, on the high seas, on board a *foreign ship*. That cannot have been intended and should be set right.

A few observations, now, on some of the amendments made to the existing law. I have not had time, as yet, to ascertain, to my own satisfaction, which of its 983 sections are new law, and which are old law, not a simple thing to do, by any means, you will admit, sir; but I have, however, seen enough of it to be in a position to assert that the changes and innovations are numerous and of a sweeping character, both in the substantive and in the adjective law.

A large, I may say, a very large number of these changes and innovations, including those in the law of murder, rape, perjury, bigamy, etc., etc., as well as those in the rules of procedure, were undoubtedly taken from the abortive bill or draft code presented to the Imperial House of Commons in 1880, that I have already alluded to. And it may be, if I am allowed to say so, that sufficient attention was not paid to the fact that these innovations, though suggested, had never been adopted in England, and that consequently, some of them have passed into this code without having been defined before Parliament in such a clear way that their consequences can have been foreseen. And, on this, rather than to speak for myself, I take the liberty to make the following quotation from the report of the committee of the Imperial House of Commons, to which had been referred, in 1875, a cognate measure, a bill on homicide drafted by Sir James Fitzjames Stephens: "Nothing could be more likely to impede, or, indeed, " utterly to frustrate the work of codification, than the suspicion

"or certainty that, under the pretext of simplification and re-arrangement, *great and important* changes were effected *which had never been brought out in a clear and simple way* to the attention of the Houses of Parliament. For these reasons, your committee are of opinion that it is not desirable to proceed with the present bill, notwithstanding that this experience in codification has been presented to them with every advantage that learning and skill could give it."

Without wishing here to enter into details, I call your attention to the following alterations and changes that I have noticed in the course of my cursory examination of the act.

The atrocious crime of infanticide by starvation, or neglect of natural duties, (so frequent in cases of illegitimacy) which has always here, as in England, and, in all the civilized world, been either murder or manslaughter, is to be nothing more in the future but a simple offence of the class now known as misdemeanours, and punishable with a mere fine, at the discretion of the Judge, or with imprisonment for not more than three years. If a husband, under a legal duty to provide necessaries for his wife, omits, without lawful excuse, to do so, and thereby causes her death, he has always been, up to the present, deemed guilty of murder or manslaughter. But that is, also, to be, in the future, but a simple offence punishable by a fine, or at the most, by an imprisonment for three years. Heretofore, a gaoler who caused the death of his prisoner, by not supplying him with the necessaries of life was guilty of manslaughter, but Parliament has decreed that that shall not be so in the future. I may be mistaken, but I am strongly inclined to think that such alterations in the law have not deliberately been made by Parliament. Yet, there they stand on the statute book, to be our law after the 1st of July. These last three changes, I need hardly say, were not proposed in the English bill of 1880.

Another instance:—It is decreed, by sec. 64, that the question, whether an act is too remote or not to constitute an attempt, shall be a question of law and not one for the jury. Has this important innovation been designedly made? See, in memo. what Chief Justice Cockburn says of a similar one, when proposed in England.

Another one again, (not proposed in the English bill):—In future, perjury, forgery, and manslaughter even, are to be triable at Quarter Sessions; counterfeiting Her Majesty's coin, treason

at common law, is also to be triable in the inferior Courts. Offences now falling under secs. 247 and 248, for injuries by explosives, heretofore not triable at Quarter Sessions, are also now to be so. I refer you for other instances of changes in the law to my memorandum.

I pass now to the intrinsic defects of the measure; they are numerous. It is replete of contradictory clauses, of redundant enactments, of clumsy, needlessly minute and irrational, or repugnant provisions, obviously leading, in many instances, to incongruities and anomalies, *rudis et indigesta moles*, cumbrous, yet not complete: the classification is unsystematic, and the whole without attempt at symmetry.

Why, for one or two instances, as to defective classification, put the offence of unlawfully digging up a dead body, under the title of nuisances? Or, why separate by eighty sections the offence of defiling a girl under 14 with the offence of defiling a girl above 14? As to repugnancy, redundancy, irrational legislation, let me refer to a few enactments as illustrations.

It is an indictable offence to conspire to induce a woman to commit adultery, but to commit adultery itself, is not, except in New Brunswick. Now, a conspiracy to commit or procure the commission of an unlawful act is, at common law, indictable, even where that unlawful act itself is not. But there is no reason, that I can see, for a special enactment as to this one, when the unlawful act itself is not made indictable. It has the effect to reduce the punishment, and that cannot have been the reason why it was enacted. Such an enactment was proposed in the English draft. It was a necessary one there, because all the common law was superseded. It has been lost sight of, in this special provision on conspiracy to cause adultery to be committed, that the common law of conspiracy remains untouched by this code.

Any one who offers for sale a putrid carcass of mutton, or an obscene photograph, or a car conductor's fault of being drunk on duty, must be prosecuted by indictment, whilst any one who entices one of Her Majesty's soldiers to desert from the service, or any one who personates a candidate at an examination in a college or university, may be punished on summary conviction. *Adultery* is to be an indictable offence in New Brunswick, *but is not to be so in the other Provinces*. A number of offences are purged by lapse of time, whilst there is no limitation for the prosecution of the attempt or conspiracy to commit the same of

fences; treason, and the offences under the trade marks act are put alone on the three year's limitation list. Why? The seducer of a girl under sixteen is protected by one years' limitation, whilst one who once offers for sale one obscene photograph, or a pound of tainted meat, has no such protection, and can be prosecuted at any time. One year relieves from all liability to punishment the nefarious crime of *a mother*, who, for a few dollars, is a party to *the ruin of her 14 year old daughter*; but the prosecution for the same offence when committed *by any other person*, on that girl, is barred by no limitation whatever. There are to be found five sections on injuries by explosives; three different enactments to say that a peace officer may arrest without warrant a person committing certain offences; two to say that a false oath, not in a judicial proceeding, amounts to perjury; two or three to provide for offences against railways; two sections to decree, in different terms, that if any one leaves a hole made by him through the ice, unguarded, he will be guilty of manslaughter, if any person loses his life by falling therein. One section enacting that an attempt to commit sodomy, will be punishable by ten years, and another one, that an assault, with attempt to commit sodomy, will be punishable by seven years. Could even a Philadelphia lawyer tell the difference between the two, between an attempt to commit sodomy and an assault with attempt to commit sodomy? With, to make confusion worse confounded, a different punishment attached to each. It is decreed that a nuisance which occasions injury to one individual is indictable. Is that a *common* nuisance?

On many of these subjects, the law, it is true, was not previously in a better state; and the errors and anomalies that I have called attention to, often are mere reproductions from the statute book. But you will bear me out, sir, when I say that this is obviously an aggravation, not an excuse of the fault committed of not taking advantage of the codification to remedy the law. The pruning knife was evidently wanting in the hands of the drafter: the "lopping off the dead branches without hurting the root," if you allow me, sir, to use the felicitous expression, was not performed, the weeding has been left undone.

A most favorable occasion has been lost to improve, to ameliorate, to make needed reforms, to reduce the bulk of the law and simplify its mechanism. I have given you illustrations of it; allow me to add a few others. A complete revision of the punishments is clearly wanted—that is admitted on all hands in

England, and our statutes on the subject do not stand on a better footing. A reference to the compilation, under the heading "Punishments," that I have attached to my memorandum, so as to afford an easy though incomplete comparison thereon, will amply demonstrate it, were demonstration necessary. But to particularize here for one moment, should not a codification have purged our statute book from the following anomalies instead of re-enacting them?—An accessory before the fact to the offence of carnally knowing a girl under fourteen, *when a perfect stranger to her*, is punishable with *imprisonment for life*. But, *if he is a guardian* who is such accessory to the like offence *on his ward*, he is punishable *by fourteen years only*. That extraordinary legislation is a reproduction from the statute of 1890. But that is not all; if it is himself, *the guardian*, who seduces his ward, he is liable only to a fine, or at the most, *to two years' imprisonment*! And another one almost as startling: a train conductor for merely being *drunk* on duty, is liable to *seven years' penitentiary*. And, for another one again, any one who, *unsuccessfully* incites another to commit an indecent assault is liable to *seven years' penitentiary*, but, if the other does, in fact, *commit* the assault, then the inciter escapes with two years' prison.

Again, to simply *obstruct* a "*public*" officer in the execution of his duty, is punishable by *ten years' penitentiary*, but to *assault* a public officer whilst performing his duty, only by *two years' prison*; and to *obstruct* a "*peace*" officer in the execution of his duty, *two years*.

Then, in many instances, it has evidently been forgotten that a codifier must not rashly cast down without also building up; that, to quote Austin's words (*Principles of Jurisprudence*)—"he should have constantly before his mind, a map of the law as a whole, enabling him to subordinate the less general under the more general, to perceive the relations of the parts to one another and thus to travel from general to particular, and from particular to general, and from a part to its relations to other parts, with readiness and ease, to subsume the particulars under the general, and to analyze and translate the general into the particulars that it contains."

Some of the instances where most beneficial enactments have been repealed and not re-enacted have been referred to in my memorandum.

As to the enactments relating to the code itself, I call your attention specially to section 981, which enacts that, after July 1st,

next, two sets of rules of procedure will be in force, one, for the offences committed before that date, and one for the offences committed after that date. That seems to me very objectionable for obvious reasons. Please refer to my note under that article for my suggestions on the subject.

Another class of errors may be mentioned. Here again I shall not enter into details. They are of a less important nature, and, evidently, the result of inadvertence. Some of the class of those I here allude to are the errors made in the repeal of the statutes. One, for instance, is the repeal of a section that had already been repealed. Another one, is the unrepeal of an enactment which clashes with an enactment on the same subject. One, *and a singular one it is*, is in enacting that the code itself shall come into force on the 1st of July, whilst the repeal of the previous Statutes takes effect only on the 2nd. So that on the 1st of July itself, for twenty four hours, the two sets of laws will be in force. Another one, a clear oversight also, has for serious consequence to strike out of the law the provision for punishing a *master, foreman or superintendent* of a factory, mill, workshop, *for the seduction of any girl under twenty-one years of age who is under his control and in his employment*. All of these, and there are not a few of them, are palpable errors; I leave it to you, sir, to say whether they do not disfigure the measure, to make use, for once, of an euphemism.

I REST HERE.—My object is simply to bring to your attention what I consider to be serious defects in this legislation, without entering into more details than necessary to *prima facie* support my remarks. In fact, the short time at my disposal, at this season of the year, would not have allowed me to do more. I have not been able to go over the whole of these 983 sections more than once, and in such a cursory way, that it is possible that some of them, not many, are not open to the objections I have taken.

There is an observation that I think proper to make, sir, before closing, one hardly necessary, yet, which it is perhaps, better for me not to omit, so that no room be left anywhere for misrepresentation or misinterpretation. Whilst addressing this letter to you as head of the administration of justice in the Dominion, in your capacity of Attorney-General, I wish it to be clearly understood that I have not committed the mistake to think that you are the author of this code of 1892. It cannot be expected, in any quarter, that an Attorney-General's duties, here not more than in England, and, perhaps here still less than in England,

would at all permit him to undertake such a task. And when Lord Chief Justice Cockburn, in 18 9, addressed his criticisms on a similar measure that I have alluded to, to the Attorney-General of England, he was, likewise, perfectly aware that though he had introduced it in the House of Commons, the Attorney-General had not drafted it.

Moreover, let me assure you, that, had it at all been possible for me to think, for one moment, that you were the author of this one, I would certainly not have taken the liberty to address you these comments. The mistakes have been made somewhere, and there lie, perhaps, the principal causes of the ill-success, first, to place too much reliance on Sir James Stephen's draft; and secondly, to form too light an estimate of the difficulties that lie in the drafting of a code, a mistake that has, in England, put such powerful arms in the hands of the opponents of codification, as to enable them, by itself almost alone, to resist successfully, so far, all endeavors in that direction. I myself, though, at one time, of opinion that a code of criminal law would be of great advantage to Canada, and might be prepared without very serious difficulties, am free to admit that I, now, have, to say the least, grave doubts on the subject. A revision and consolidation, not a mere compilation, of the statutory law, would, perhaps, be all that is necessary in that direction to supply the present needs of the administration of justice in Canada.

Should Parliament, however, not determine to withdraw the present one, temporarily at least, I suggest that the ends of justice might perhaps require that the date of its coming into force should be postponed.

I have the honour to be, Sir,

With highest consideration,

Your obedient servant,

H. E. TASCHEREAU,

Judge, Supreme Court.

THE HON. SIR JOHN THOMPSON, K.C.M.G.

Minister of Justice and Attorney-General.

P.S.—Following the course adopted by Lord Chief Justice Cockburn, in England, when addressing the Attorney-General on an analogous subject, I give to this communication the form of an open letter. I trust, sir, that you will see no impropriety in my doing so.

SUPREME COURT OF CANADA.

OTTAWA, Dec. 13, 1892.

Quebec.]

MCGREGOR v. CANADA INVESTMENT & AGENCY Co.

*Will—Construction—Usufruct—Sheriff's sale—Effect of—
Art. 711, C. C. P.*

The will of the late J. McG. contained the following provisions:—

“Fifthly. I give, devise and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife, the usufruct, use and enjoyment during all her natural lifetime of the rest and residue of my property movable or immovable..... in which I may have any right, interest or share at the time of my death, without any exception or reserve.

“To have and to hold, use and enjoy the said usufruct, use and enjoyment of the said property unto my said wife the said Helen Mahers, as and for her own property from and after my decease, and during all her natural lifetime.

“Sixthly. I give, devise and bequeath in full property unto my son James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind movable, real, or personal, or of which the usufruct, use and enjoyment during her natural lifetime is hereinbefore left to my said wife the said Helen Mahers, but subject to the said usufruct, use and enjoyment of his mother the said Helen Mahers during all her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever; should however my said son the said James McGregor die before his said mother, my said wife the said Helen Mahers, then and in that case I give, devise and bequeath the said property so hereby bequeathed to him to the said Helen Mahers in full property, to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever.

“To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property for ever, and in the event of his predeceasing his said

mother, unto the said Helen Mahers her heirs and assigns, as and for her and their own property for ever."

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), 1 B. R. Q. (1892) 197, that the will of J. McG. did not create a substitution, but a simple bequest of usufruct to his wife and of ownership to his son.

Held, also, that a sheriff's sale (*décret*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will. Art. 711 C. C. P. *Patton v. Morin*, 16 L. C. R. 267, followed.

Appeal dismissed with costs.

Honan and *E. Lafleur* for appellant.

Lafamme, Q.C., and *H. Abbott, Q.C.*, for respondent.

OTTAWA, Dec. 13, 1892.

Quebec.]

AUBREY-GALLION v. ROY.

44-45 Vic., Ch. 90 (P. Q.)—*Toll-bridge—Franchise of—Free bridge—Interference by—Injunction.*

By 44-45 Vic. (P. Q.), Ch. 90, sec. 3, granting to respondent a statutory privilege to construct a toll-bridge across the Chaudière River in the parish of St. George, it is enacted that "So soon as the bridge shall be open to the use of the public as aforesaid, during thirty years no person shall erect or cause to be erected, any bridge or bridges or works, or use or cause to be used, any means of passage for the conveyance of any persons, vehicles or cattle for lucre or gain across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll-bridge or toll-bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river, for the conveyance of persons, vehicles or cattle, within such limits, shall pay to the said David Roy, three times the amount of the tolls imposed by the present Act, for the persons, cattle or vehicles, which shall thus pass over such bridge or bridges; and if any person or persons shall, at any

time, for lucre or gain, convey across the river any person or persons, cattle or vehicles within the above mentioned limits, such offender shall incur a penalty not exceeding \$10 for each person, animal or vehicle which shall have thus passed the said river; provided always that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles or loads from crossing such river within the said limits by a ford, or in a canoe or other vessel without charge."

After the bridge had been used for several years the appellant municipality passed a by-law to erect a free bridge across the Chaudière in close proximity to the toll bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge.

Held, affirming the judgments of the Courts below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll bridge, and the injunction should be granted.

Appeal dismissed with costs.

Lemieux, Q.C., & Taschereau, Q.C., for appellant.

Fitzpatrick, Q.C., for respondent.

OTTAWA, Dec. 3, 1892.

Quebec.]

VALLÉE V. PREFONTAINE.

DUFRESNE V. PREFONTAINE.

Builder's privilege—Arts. 1695, 2013, 2103, C. C.—Expert—Duties of—Procès verbal—Arts. 333 et seq., C. C. P.

Appeal from judgment of the Court of Queen's Bench, P. Q., *Vide* 1 B. R. Q. (1892), 330.

Held, 1. That it is not necessary for an expert, when appointed under Art. 2013, C. C. to secure a builder's privilege on an immovable, to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by arts. 322 *et seq.* C. C. P.

2. That there was evidence to support the finding of fact of the Courts below that the second *procès-verbal*, or official statement required to be made by the expert under art. 2013, had been made within six months of the completion of the builder's works.

3. That it was sufficient for the expert to state in his second *procès-verbal* made within the six months, that the works described had been executed and that such works had given to the immovable the additional value fixed by him. The words completed "*suivant les règles de l'art,*" are not *strictissimi juris*.

4. That if an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity but will only entitle the interested parties to ask for a reduction of the expert's valuation.

Appeals dismissed with costs.

Geoffrion, Q.C., Béique, Q.C., & Beaudin, Q.C., for appellants.

Girouard, Q.C., & Madore for respondent.

OTTAWA, Dec. 13, 1892.

British Columbia.]

RE COUNTY COURT JUDGES OF BRITISH COLUMBIA.

(Referred by Governor General in Council.)

Constitutional law—Administration of justice—Constitution of Provincial Courts—Powers of Federal Government—Appointment and payment of judges—B. N. A. Act, s. 92, s.s. 14.

The power given to the provincial governments by the B. N. A. Act, s. 92, s.s. 14, to legislate regarding the constitution, maintenance and organization of provincial courts, includes the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts.

The C. S. B. C., c. 25, s. 14, enacted that "Any county court judge appointed under this Act may act as county court judge in any other district, upon the death, illness or unavoidable absence of, or at the request of the judge of that district, and while so acting the said first mentioned judge shall possess all the powers and authorities of a county court judge in the said district; provided, however, the said judge so acting out of his district shall immediately thereafter report in writing to the provincial secretary the fact of his so doing and the cause thereof;" and by 53 Vict., c. 8, s. 9 (B. C.), it is enacted that "Until a county court judge of Kootenay is appointed, the judge of the county court of Yale shall act as and perform the duties of the county court judge of Kootenay, and shall, while so acting,

whether sitting in the county court district of Kootenay or not, have, in respect of all actions, suits, matters or proceedings being carried on in the county court of Kootenay, all the powers and authorities that the judge of the county court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by sections 5 and 7 of the County Courts Act, over which the county court of Yale and the county court of Kootenay, respectively, have jurisdiction shall be united."

Held, that these statutes are *intra vires* of the Government of British Columbia under the said section of the B. N. A. Act.

By the Dominion statute, 51 V., c. 47, "The Speedy Trials Act," jurisdiction is given to "any judge of a county court" among others, to try certain criminal offences.

Held, that this expression "any judge of a county court" in such Act, means any judge having, by force of the Provincial law regulating the constitution and organisation of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorise a county court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial legislature so to do.

Held also, that the Speedy Trials Act is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure.

Æmilius Irving, Q.C., for Atty. Gen. of B. C.

Sedgewick, Q.C., for Atty. Gen. of Canada.

OTTAWA, Dec. 13, 1892.

Ontario.]

ARCHIBALD v. McLAREN.

Action for malicious prosecution—Reasonable and probable cause—Inference from facts proved—Functions of judge and jury.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause is to be decided by the judge and not the jury.

A., staff inspector of the Toronto police force, laid an information before the police magistrate charging M., a married woman, with the offence of keeping a house of ill-fame. In laying the

information A. acted on a statement made to him by a woman who alleged that she had been a frequenter of the house occupied by M. and stated facts sufficient, if true, to prove the charge. A warrant was issued against M. who was arrested and brought before the magistrate, who, after hearing the evidence, dismissed the charge. M. and her husband then brought an action against A. for malicious prosecution.

The action was tried three times, each trial resulting in a judgment of non-suit which was set aside by a divisional Court and a new trial ordered. From the judgment ordering the third new trial A. appealed and the judges in the Court of Appeal being equally divided the order for new trial stood. A. then appealed to the Supreme Court of Canada.

At the last trial of the action it was shown that A. had requested the police inspector for the division in which M.'s house was situate, to make inquiries about it, and that after the information was laid the inspector informed A. that there were frequent rows in the house owing to the intemperance of M., and that he thought there was nothing in the charge. The trial judge did not submit the case to the jury but held that want of reasonable and probable cause was not shown; but the Divisional Court held that he should have asked the jury to find on the fact of A's belief in the statement furnished to him on which he acted in bringing the charge.

Held, Taschereau, J., dissenting, that A. was justified in acting on the statement, and the facts not being in dispute there was nothing to leave to the jury; that the trial judge rightly held that no want of reasonable and probable cause had been shown, and his judgment should not have been set aside and must be restored.

Appeal allowed with costs.

Maclaren, Q.C., for the appellant.

Tytler for the respondents.

OTTAWA, Dec. 13, 1892.

North West Territories.]

FAIRCHILD v. FERGUSON.

Promissory note—Form of—“Sixty days after date we promise to pay,” and signed by manager of company—Liability of company on.

R., manager of an unincorporated lumbering Co., gave a promissory note for logs purchased by him as such manager, com-

mencing "sixty days after date we promise to pay," etc., and signed it: "R., manager O. L. Co." An action on this note against the individual members of the company, was defended on the ground that it was the personal note of R.; that the words "manager," etc., were merely descriptive of R.'s occupation; and that the defendants were not liable.

Held, affirming the judgment of the Supreme Court of the North West Territories (1 N. W. T. Rep. part 3, p. 41), that as the evidence showed that when the note was given both R. and the creditor intended it to be the note of the company, and as R. as manager was competent to make a note on which the members of the company would be liable, and as the form of the note was sufficient for that purpose, the defence set up could not prevail and the plaintiffs in the action were entitled to recover.

Appeal dismissed with costs.

Ewart, Q.C., for appellants.

Ferguson, Q.C., for respondents.

COURT OF APPEAL ABSTRACT.

Privilege—Hypothec—Non-registration—Effect of.

Appellant, holder of a *bailleur de fonds* claim on an immovable in the possession of M (being the unpaid balance of the price of sale from L. to M.) brought the property to judicial sale. Respondents were collocated by privilege on the proceeds, for the amount of an obligation with hypothec executed by L. before the sale, and transferred to respondents. The title of L. was not registered until after the sale to M.

Held, maintaining the collocation, that appellant, transferee of the rights of L., held the relation of debtor as regards the respondents; that L. could not, by selling and reserving to himself a *bailleur de fonds* claim, create in his own favor a preferential claim over that of his hypothecary creditor. Notwithstanding absence of registration of title, a hypothecary creditor has a valid hypothec as regards his debtor, and is entitled to be collocated by preference to him on the proceeds of the immovable hypothecated.—*Dolan & Baier*, Montreal, Lacoste, C.J., Bosé, Blanchet, Hall, Wurtele, JJ., June 8, 1892.

Engineer—Workman and laborer—R.S.Q., 5931.—*Art.* 628, *par.* 5, *C.C.P.*

Held, that an engineer engaged on a steamer, and having the

supervision and direction of the motive power, is not, within the meaning of Art. 628, par. 5, C.C.P., a workman or laborer (*operarius*), and therefore his wages are not exempt from seizure to the extent of three-fourths thereof.—*Cie. de Navigation R. & O. & Triganne*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet and Hall, JJ., Sept. 26, 1892.

*College of physicians and surgeons—R.S.Q., 3977—Construction of—
—Discretion of medical board.*

Held, that Art. 3977, R.S.Q., which provides that the Provincial Medical Board "has power to grant the same privilege (i.e., a license to practise without examination) to holders of degrees or diplomas of medicine and surgery from other British, Colonial or French universities or colleges," does not make it imperative on the Provincial Medical Board to grant such license, but merely vests the Board with discretionary power to grant or refuse a license as they see fit.—*College de Medecins et Chirurgiens & Pawlides*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet and Hall, JJ., Sept. 26, 1892.

Hypothec—Payment of hypothecary claim by purchaser.

M. acquired an immovable against which a judgment had previously been registered. M. paid this hypothecary claim out of the purchase price payable by him only after the extinction of an usufruct on the property. When he did so, the time for renewing the registration of the hypothec had not expired, and he did not renew the registration of the judgment within the delay of the *cadastre*.

Held, that the payment by M. of the hypothec on the property was made *en temps utile*, and had the effect of extinguishing the hypothec, and that M. was entitled to retain the amount so paid out of the price payable to his vendor.—*Kay & Gibeault*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchot and Wurtela, JJ., Dec. 23, 1892.

Master and servant—Dismissal of employee—Damages.

Held, where an employee who is engaged for a definite term, is dismissed without sufficient grounds before the expiration of his engagement, and it is shown that he was unable to procure work at his trade elsewhere, he is entitled by way of damages to

his wages from the date of dismissal until the end of the period for which he was hired.—*Montreal Watch Case Co. & Bonneau*, Montreal, Lacoste, C.J., Baby, Blanchet, Hall and Wurtele, J J., Nov. 26, 1892.

Substitution—Institutes—Community—Arts. 947, 949, C.C.

Held, that institutes are entitled to sue for the recovery of a debt due to them as institutes, without the curator to the substitution being a party to the cause.

2. Husband and wife *communs en biens*, and sued as such, may be condemned jointly and severally for the amount of an obligation contracted by the wife, for her personal affairs, and for which her husband became personally liable, even where it is not expressly stated that he binds himself jointly and severally with her.—*Ouimet & Benoit*, Montreal, Baby, Bossé, Blanchet, Hall and Wurtele, JJ., Sept. 26, 1892.

Contract—Sale—Error—Nullity.

The defendant purchased an immovable property at auction for \$5,000. In the conditions of sale were the following words, "lease to be respected, rental £90." This was an unintentional error, the lease, which had one more year to run, being for £85. The rent was not mentioned in the public advertisements of the sale; the seller acted in good faith, and had offered to make up the deficiency in rental.

Held, that the error was not sufficiently serious to justify the buyer in treating the sale as a nullity, and in refusing to complete the purchase.—*McBean & Marler*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., May 21, 1892.

Costs—Discretion of court.

Held, where appellant had agreed to discharge a hypothec in his favor, registered against an immovable, and it appeared that he had instructed his notary to prepare the discharge, but through inadvertence no discharge was executed or registered until after the institution of an action against him *en radiation d'hypothèque*, the Court of Appeal will not interfere with the discretion exercised by the Court below in condemning the appellant to pay the costs of such action,—more especially as the hypothec in question was not in fact included in the registered trans-

fer of his rights pleaded by appellant.—*McLaren & Laperrière*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall, Wurtele, JJ., May 21, 1892.

Simulation—Seizure against party not registered owner—Procedure.

Held, where opposant's title to immovable property, acquired by her from a disinterested third party, was duly registered before the existence of the claim of a judgment creditor of opposant's husband, and no action to annul the wife's deed had ever been instituted, such creditor is not entitled to seize the property, and a contestation by him of the wife's opposition on the ground that the deed to the wife was simulated, and that the husband was the real owner, cannot be maintained.—*Lefebvre & Marsan dit Lapierre*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., May 21, 1892.

Pledge—Bank—Commercial matter—Knowledge of insolvency—Arts. 1036, 1488, 1966a, C.C.

Held, 1. The pledge of goods to a bank by a trader, as collateral security, the goods in question being held at the time by the trader under commercial documents of title duly endorsed and transferred to him, and the pledge being in the course of the bank's regular business, is a commercial matter; and the bank receiving such pledge in good faith thereby acquires a valid title to the goods, and the right to dispose of the same for its benefit.

2. A transfer of promissory notes made by a trader to a bank as collateral security for a debt due by him to the bank, the manager of the bank, at the time of the transfer, having reason to know that the transferor is insolvent, is void under art. 1036, C. C.—*Canadian Bank of Commerce & Stevenson*, Montreal, Baby, Bossé, Blanchet, Hall and Wurtele, JJ., May 21, 1892.

Jurisdiction—Cause of action—Intervention—Arts. 114, 157, C. C. P.

Held, 1. Where the intervening party, within three days after allowance of the intervention, fails to have it served upon the parties in the case, and to file a certificate of such service, it is held not to have been filed, and a motion to dismiss a second intervention by the same party on the ground that the first is still in the record, will not be granted. (Art. 157, C. C. P.)

2. Where the plaintiff, domiciled in the district of M., revendicates as his property goods in the possession of a defendant domi-

ciled in another district, and alleged to be illegally detained by him therein, the action, being based on defendant's possession of the goods, should be brought in the district of his domicile.

3. Where an action is manifestly beyond the jurisdiction of the Court, it will be dismissed even though no declinatory exception has been filed.

4. A person who intervenes in an action of revendication (the defendant making default), in order to contest the seizure, may raise the question of jurisdiction by his intervention, without having filed a declinatory exception within four days from the allowance of his intervention.

5. The intervening party in such case, is not bound by a consent to the jurisdiction, proved to have been given by defendant, before the institution of the action.—*Goldie & Rasconi*, Montreal, Lacoste, C.J., Blanchet, Hall, J.J., and Doherty, A.J., June 8, 1892.

SUPERIOR COURT ABSTRACT.

Gaming contract—Pledge—Money deposited with broker as margin on speculative stock transactions—Action to recover balance of deposit—Interest.

Held: 1. An action lies for the recovery of money deposited by the plaintiff in the hands of a broker, as "margin" for speculative stock transactions which were admittedly mere *jeux de bourse*; the money in question being the balance remaining in the broker's hands, as shown by the account rendered by him, after payment of all losses incurred in the transactions. The illicit nature of the debt to secure which a pledge is given, is not a ground which the pledgee can invoke as entitling him to retain the pledge,—more especially where the pledge is given, as in the present case, to secure merely an eventual indebtedness, which, whether licit or illicit, has never existed, the event on which it was to come into existence not having occurred.

2. Interest is due on such balance only from the date of service of action.—*Perodeau v. Jackson*, S. C., Doherty, J., Montreal, December 10, 1892.

Circuit Court—Jurisdiction—Contract—Fraud.

Held, 1. On the contestation of the declaration of a garnishee, in the Circuit Court, that that Court has jurisdiction to pronounce upon the validity of a deed invoked by the garnishee to

prove title to goods in his hands, though the price or consideration mentioned in the deed exceed \$200.

2. An onerous contract made by an insolvent debtor with a person who does not know him to be insolvent, and whose acts throughout show good faith, will not be set aside as simulated and fraudulent.—*Adams et al. v. Boucher, & Boucher*, T. S., Montreal, in Review, Johnson, C. J., Tait and Davidson, JJ., Nov. 30, 1892.

Sale à reméré—Simulation.

The sale à reméré by a debtor to enable him to pay part of his liabilities cannot be attacked as simulated, fraudulent and preferential by a creditor who was cognizant of the sale, and himself received the proceeds of it. Under such circumstances the remedy of the creditor is, not to deprive the advancer of his security, but rather to disinterest him by repaying him, and thus bring the security back into the debtor's estate.—*Ratté v. Noël et al.*, and *Matte*, oppt., S. C., Quebec, Andrews, J., March 23, 1892.

Officier public—Taxe imposée par l'article 1213, S. R. P. Q.

Jugé, Que la taxe de vingt pour cent sur l'excédant de la recette nette des officiers publics au-dessus de mille piastres, imposée par le statut 45 Vic., ch. 17, sec. 2, codifié maintenant dans l'article 1213 des statuts refondus de la province de Québec, peut être exigé des officiers publics qui étaient en fonctions lors de la passation du dit statut.—*Turcotte es qual. v. J. C. Auger*, Pagnuelo, J., Montréal, 9 jan. 1892.

Droit maritime—Saisie-conservatoire d'un vaisseau—Dernier voyage—Privilège du dernier équipier—Art. 2383, § 5, C. C.

Dans les premiers jours de novembre 1891, les demandeurs ont approvisionné le steamer Haytor qui fit voile le 5 novembre pour Rotterdam. De là il alla successivement à Cardiff, Wales, à Baltimore, à Falmouth, à Newport en Virginie, à Livourne, à Eliza qui est une île sur la côte d'Espagne, à St. Jean de Terre-Neuve, à Pictou dans la Nouvelle Écosse. De Pictou il fit voile pour Montréal, où il arriva le 11 mai 1892. Le lendemain les demandeurs le fit saisir pour assurer leur privilège.

Jugé, Que toutes ces courses ne constituent, en égard au privilège accordé par l'article 2383, § 5, C. C., qu'un seul et même voyage; que l'expression "dernier voyage" dont se sert cette

article, s'entend du voyage complet d'aller et retour, et que ce voyage n'est achevé que lorsque le navire revient au port de départ. Que c'est le droit français, et non le droit anglais, qui fait autorité sur cette matière.—*McLea v. Holman*, C. S., Montréal, Pagnuelo, J., 3 décembre 1892.

Preuve—Copie de document—Action en nullité de procès-verbal—Compétence de la Cour Supérieure—Pouvoirs des conseils municipaux—Procès-verbal—Surintendant spécial et répartition.

Jugé :—1. La copie d'une copie d'un procès-verbal contenant une attestation du secrétaire-trésorier qu'il n'existe que sous cette forme dans les archives dont il est dépositaire, ne constate pas l'existence du procès-verbal, et n'en constitue pas la preuve légale dans une action intentée pour le faire annuler.

2. La Cour Supérieure est compétente à connaître d'une action par un intéressé en nullité d'un procès-verbal homologué, même après l'expiration des trente jours dans lesquels la demande en cassation doit être portée devant la Cour de Circuit.

3. Mais l'action ne peut être prise avant l'homologation du procès-verbal, qui n'est jusqu-là qu'une information au corps municipal auquel il est adressé.

4. Un conseil municipal peut, par résolution, nommer un surintendant spécial pour faire une répartition de travaux en vertu d'un procès-verbal qui n'en contient pas, et le rapport exigé par l'article 809a, C. M., n'est pas requis en ce cas. Ce surintendant peut être choisi en dehors de la municipalité. Art. 204, C. M.—*Lacoursière v. Corporation du Comté de Maskinongé*, Québec, en révision, Casault, Caron, Andrews, JJ., 31 mars 1892.

Sale without reserve—Mining rights—R. S. Q. 1421—Non-apparent servitude—C. C. 1519—C. C. P. 126.

Held : An unreserved sale of an immovable conveys all mining rights on the same, subject to the provisions of the Quebec mining laws; and an action will lie to resiliate such sale, or for an indemnity, by the purchaser who subsequently discovers that a reserve of such mining rights exists in favor of his vendor's auteurs.—*Neill v. Proulx*, Quebec, in Review, Casault, Routhier, Andrews, JJ., April 30, 1892.

Assignment—Exception à la forme—Temps moyen et vrai—"Standard time."

Jugé : Le temps moyen à l'endroit où une assignation est donnée

est celui qui doit déterminer si elle l'a été avant sept heures du matin, ou après sept heures du soir.

2. D'après le temps moyen à Ste. Luce, le 31 octobre dernier, la défenderesse a été assignée avant sept heures du soir (Casault, J., diss.).—*Leclaire v. Gagné*, Québec, en révision, Casault, Routhier, Andrews, JJ., 30 avril 1892.

QUEEN'S BENCH DIVISION.

TORONTO, Dec. 29, 1892.

Coram ROSE, J.

NIXON v. GRAND TRUNK R. Co.

Railway—Damage to animals—53 Vict. (D.), ch. 28, s. 2.

Plaintiff's horses escaped from his farm, passed down a concession road to an allowance for road which was intersected by defendant's railway, then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train.

HELD:—*That the horses not being in charge of any person, were not properly within half a mile of the point of intersection, and so did not get upon the railway from an adjoining place where, under the circumstances, they might properly be; and notwithstanding the absence of cattle-guards the plaintiff was not entitled to recover.*

ROSE, J.—This demurrer raises the question of the proper construction of 53 Vic., ch. 28, s. 2 (D.), repealing s-s. 3 of s. 194 of "The Railway Act," 51 Vict., ch. 29, and substituting a new section therefor. The 51st Vict. repealed Cap. 109, R. S. C. (1886) S. 13, which provided for the construction and maintenance of fences and cattle guards.

Under s-s 2 of S. 13 the liability of a railway company for damages to animals on the railway where fences or cattle guards were not constructed or maintained was absolute and unconditional.

Hurst v. B. & L. H. R. Co., 16 U. C. R. 299; *Daniels v. G. T. R. Co.*, 11 A. R., p. 474.

By the 51st Vict. the liability was limited to damages done to animals "not wrongfully on the railway and having got there" in consequence of the omission to make complete and maintain "such fences and cattle guards as aforesaid."

The 53 Vict. introduced the following provision: "3. If the company omits to erect and complete as aforesaid any fence or cattle guard, or if after it is completed the company neglects to maintain the same as aforesaid, and if in consequence of such omission or neglect any animal gets upon the railway from an adjoining place where under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

A perusal of the cases above referred to as well as of *Ferrie v. G. T. R.*, 16 U. C. R. 474; *McKennan v. G. T. R.*, 8 C. P. 411; *Simpson v. G. W. R.*, 17 U. C. R. 57; *Corley v. G. T. R.*, 18 U. C. R. 96; *Conway v. G. T. R.*, 12 A. R. 708; and *Duncan v. C. P. R.*, 21 O. R. 355, will show the history of the legislation, the construction put upon it by the Courts and the object and effect of the clause above set out.

The facts appearing upon the record show that the horses in question "escaped" from the plaintiff's farm, passed down a concession road to an allowance for road which was intersected by the railway, then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. No negligence is charged in the management of the train, the only negligence charged is in not constructing and maintaining cattle guards or fences. I do not see why anything is said about fences, as no fence could have prevented the horses going from the highway on the railway. A cattle guard would no doubt have kept the horses from travelling along the track of the railway, and it may properly be said that it was in consequence of the omission or neglect to construct and maintain a cattle guard that the animals got upon the railway from the highway.

Then, was the highway a place where, under the circumstances, the animals at the time when they went on the track "might properly be?" If they were animals "allowed by law to run at large," the fact that they were on the highway without the permission of the owners of the road, would not, of itself, be sufficient to warrant a holding that the animals were improperly on the highway.

Sec. 271 prohibits the permitting of horses, etc., to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, "unless such cattle are in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection." See *Simpson v. G. W. R.*, *supra*.

From the pleadings we learn that the line of the railway crosses the road allowance "on the level." It does not appear that the horses were in charge of any person; if not, they were not properly within half a mile of the point of intersection, and so did not get upon the railway from an adjoining place, where, under the circumstances, they might properly be. The case of *Daniels v. G. T. R.*, above referred to, is much in point. See also *Corley v. G. T. R.*, *supra*.

In my opinion the defendant is entitled to judgment on the demurrer with costs.

H. S. Osler for demurrer.

Watson, Q.C., contra.

ENGLISH TESTAMENTARY LAW.

It may be worth while to draw attention to what appears to be a serious defect in English testamentary law. No curb is placed by the law of England on the arbitrary power of testators. If a person is proved to have been of sound mind, and not under undue influence at the time of making his (or her) will, and if the will is correct in form, English law will not venture to set it aside, no matter how cruel, how unjust, or unnatural may be its provisions. Suppose, for instance, a man has conceived some unfounded antipathy against his wife and children—a thing that sometimes happens—there is nothing to prevent him, according to English jurisprudence, from leaving them penniless, although he happens to die a millionaire. He may give all his property to an utter stranger—to a mistress, for instance—and the law will not interfere with his will. As a text-book on Probate Law puts it, 'However ridiculous or extravagant the dispositions of a will may be, still if the testator was, at the time, of sound mind, and not acting under undue influence, the will must be established.' Many examples have been given of absurd and capricious wills, which were upheld by the English Probate Court. The will of an Englishman, who had at different times, while residing in India, professed the Hindoo and Mohammedan faith, and who,

to the exclusion of all his relatives, left the bulk of his property for the benefit of the poor of Constantinople was held to be perfectly valid (*Austen v. Graham*, 8 Moo. P. C. C. 493). In 1838, a man named Boys, a clerk and book-keeper, by his will left all his property to a stranger, and directed his executors to cause some of his bowels to be converted into fiddle strings, others to be sublimed into smelling salts, and the remainder of his body to be vitrified into lenses for optical purposes. This extraordinary will was upheld (*vide Monthly Law Magazine* for 1838, p. 117). But surely the sanity of this testator was, at least, open to suspicion.

Some restraint should certainly be placed on the arbitrary power of disinheriting those who have a natural claim on the testator. It is easy to conceive a case where a father might reasonably punish a worthless son by leaving him merely the means of subsistence; but the law should be at liberty to set aside wills which are inofficious, or, to use a less technical word, unnatural.

Nearly every code of laws, except the English, has limited the powers of testators in this respect. In the laws of ancient Rome there was a form of procedure known as the *querela inofficiosi testamenti*, whereby children or other persons who had without cause been excluded from the testator's will, could seek to set it aside even though it was formally perfect. Even brothers and sisters of the half-blood were allowed to bring this suit by the laws of Justinian. It should, however, be mentioned that, if anything was left to a person by the will, he could not attack it as *inofficiosum*, but he had the right to bring the action in *supplementum legitimæ*, to have that which was left to him made up, so as to equal the fourth part of what he would have taken *ab intestato*.

The testator's power of disposition is greatly restricted in France and Spain. In France, if a man at the time of his death has only one legitimate child, he cannot dispose of more than a moiety of his goods; if he leaves two children, he can only dispose of a third, and if he leaves three or four he can only dispose of a fourth. In Spain, he who has a child, grandchild, or other descendant, can only will one-fifth to strangers. If he has no legitimate offspring he may give all to his illegitimate children; and a woman may, in the absence of legitimate offspring, leave all she dies possessed of to illegitimate children, provided they are not the fruit of adultery. The Italian law has some-

what similar provisions. In Turkey there is no power of making a will, and the law disposes of a man's property. Of course, there is an exception in the case of non-Turkish subjects residing in the Ottoman Empire.

Nature, and the elementary principles of justice, demand that no man should have the power, through mere caprice or malice, of beggaring his wife and children. English law has failed to recognise this principle, and, therefore, it is desirable that, either by statute or otherwise, the powers of testators should be curtailed within reasonable limits.—*Irish Law Times*.

GENERAL NOTES.

TRESPASS BY SUBTERRANEAN SQUEEZING.—A recent New Jersey case (*Costigan v. Pennsylvania Railway Company*, 23 Atl. R. 810) presents a rather novel instance of trespass. The declaration charged that the defendants wrongfully and injuriously made, on their own land, an embankment so heavy that the downward pressure (two hundred thousand tons), causing an equal lateral pressure, forced earth and gravel, lying below the surface in the defendant's land, into the plaintiff's land, thereby disturbing the surface of the plaintiff's lot, moving his house on to land not his, and cracking its foundation. The defendants justify under their charter, the embankment being properly and carefully built. The Court holds that while the charter justifies any public damage from reasonable working of the road, as injury arising from noise, smoke, cinders, vibration, any damage which in its nature is distinctly private is not within their privilege. This decision, that such an embankment is not within the legislative sanction, which on the facts stated seems open to doubt, leaves the question as though the act had been done by a private individual, and the result of the case is that no man shall squeeze his neighbour's land, even below the surface. To say that a man cannot put buildings of the size he chooses on his own land is at first a startling doctrine; but if the plaintiff can prove actual transfer of particles of earth from his neighbour's lot to his, however far below the surface, it seems to follow necessarily that there is a trespass. Of course, as every downward pressure produces lateral pressure, and pressure is displacement, a man trespasses with every step he takes on his own land. It also follows that, since the right to support extends only to the land itself, a man is absolutely responsible for all damages to his

neighbour's land resulting from building on his own, however firm his land and however loose that of his neighbour. It is needless to add that the unmetaphysical sympathies of juries, as well as the infrequency of violent subterranean displacements, will keep this scientific principle within due limits.—*Harvard Law Review*.

PERSONAL STATISTICS.—The oldest Cabinet Minister is the Right Hon. William Ewart Gladstone, M.P., First Lord of the Treasury and Lord Privy Seal, aged eighty-three years; the youngest is the Right Hon. Herbert Henry Asquith, Q.C., M.P., Secretary of State for the Home Department, aged forty-one. The oldest member of Her Majesty's Privy Council is the Right Hon. Sir James Bacon, aged ninety-four; the youngest, the Right Hon. Lord Walter Gordon-Lennox, M.P., aged twenty-seven. The oldest member of the House of Commons is the Right Hon. Charles Pelham Villiers, M.P. for the Southern Division of the Borough of Wolverhampton, aged ninety-one; the youngest, Mr. William Shepherd Allen, M.P. for the Borough of Newcastle-under-Lyme, aged twenty-two. The oldest judge in England is the Right Hon. Lord Esher, Master of the Rolls, aged seventy-six; the youngest, the Hon. Sir John Gorell Barnes, of the Probate, Divorce and Admiralty Division of the High Court, aged forty-four. The oldest judge in Ireland is the Hon. John Fitz-Henry Townsend, LL.D., of the Court of Admiralty, aged eighty-two; the youngest, the Right Hon. John George Gibson, of the Queen's Bench Division, aged forty-six. The oldest of the Scotch Lords of Session is the Right Hon. George, Lord Young, aged seventy-three; the youngest, the Right Hon. Lord Robertson, Lord Justice-General, aged forty-seven.—*Who's Who in 1893*.

MESMERISM.—The following curious and interesting question is asked by *Law Notes*: "If A. mesmerizes B. and induces him to disclose his most private affairs, can B. have a summons for assault against A.? A metropolitan magistrate the other day declined to grant one. What is the remedy, a civil action for damages?" It has struck us on several occasions of late that before very long the difficulties of the magistrate and of the law may be very appreciably increased by the constant recurrence of questions connected with the conduct of hypnotizers, mesmerizers and others of the kind toward patients, particularly females. The existence of a mysterious power for evil, in the nature of hypnotization, cannot be denied or ignored.—*Indian Jurist*.

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CURRENT TOPICS AND CASES.

The courts are seldom called upon to deal with a more complicated and voluminous case than that of the Labrador Company, reported in the present issue. Lord Hannen, with his usual ability, and clearness, has delivered a judgment which shows that the case has received very close attention, and it is satisfactory to find that he has discovered no reason for differing from the conclusions reached by our Court of Appeal. The case also possesses some historical interest, involving as it does a review of titles extending back more than two centuries.

Three of the numerous holidays which have been observed by the Courts of the Province of Quebec and by Parliament, are about to disappear from the legal calendar. Hon. Mr. Angers has introduced a bill in the senate, which provides that "the Annunciation, Corpus Christi and the Festival of St. Peter and St. Paul shall not henceforth be holidays." This is in compliance with the wish of the Roman Catholic Church, and will also be enacted in the Province of Quebec.

An elaborate criticism of the Canadian Criminal Code, by Mr. Justice Taschereau, of the Supreme Court, in the form of a letter to the Minister of Justice, appeared in our last issue. Several defects of importance are

pointed out. The observations contained in the letter are accompanied by a commentary on the articles criticised, in which the writer states at greater length the objections suggested by an examination of the Code. The observations of the learned judge, who, from his study of the criminal law, is an authority on the subject, indicate the wisdom of the course pursued in postponing for a time the coming into force of the Code. It has been pertinently remarked, however, that these observations would have been more useful if they had been presented while the bill was under consideration. Some of the topics treated were not overlooked while the measure was before the House. Other defects pointed out by the learned judge will be remedied by a short amending act.

One point to which Mr. Justice Taschereau has directed attention is of considerable importance, that is, the necessity of some guide to the changes which have been actually effected in the criminal law. The Civil Code Commissioners indicated new law by placing within brackets the clauses which changed the old law. These aids have been found of great value. The Commissioners also framed reports in which the changes were commented upon. Every lawyer who has practised since the introduction of the Civil Code knows how much confusion has been avoided by these reports, and how frequently they have been referred to. If it were possible to have some substitute for these reports, in regard to the Criminal Code, much of the difficulty of finding the law, to which Mr. Justice Taschereau makes pathetic allusion, would be removed.

The important bill introduced by Attorney General Casgrain, in the Quebec legislature, affecting the judicial system, has been postponed for a year. This delay is demanded by the bar, in order that the changes may be

fully considered. The principal features of the bill, creating two orders of judges, reducing the number of superior judges, and permitting them to reside in the large cities, seem to offer great advantages.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, NOV. 19, 1892.

Present: Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS and HANNEN.

LABRADOR Co. v. THE QUEEN.

THE QUEEN v. LABRADOR Co.

Act of Parliament—Statement contained therein—Force of—Schedule under Seigniorial Act—Seigniority of Mingan.

Held:—1. *It is not competent for a court of law to disregard an absolute statement of fact contained in an Act of the legislature, even if it could be proved that the legislature was deceived. If a mistake has been made in an Act the legislature alone can correct it. So, it being stated in the Seigniorial Amendment Act of 1858 (19 Vic. c. 53, s. 10), that there was a Seigniority of Mingan, the courts are bound to give effect to such determination.*

2. *Where the schedule made under the Seigniorial Act of 1855 has been deposited without complaint being made by any person interested therein, it must be deemed to be correct, and to establish conclusively the existence and boundaries of the Seigniority therein described.*

LORD HANNEN :

The subject matter of these appeals is a tract of country on the northern shore of the Gulf of the St. Lawrence, extending from Cape Cormorant to the Strait of Belle Isle, a distance of more than 400 miles, with a depth of six miles.

The Labrador Company is in possession of this territory. The Attorney General for the Province of Quebec, on behalf of Her Majesty, seeks to recover it from the company, who claim title to the whole of the land in question under a grant alleged to have been made in 1661 to one François Bissot by "the Company of New France," deriving its powers from the Crown of France. The Labrador Company also claimed a title by prescription and immemorial possession. In answer to this claim the Attorney-General denies that the alleged grant of 1661 gave a title to the

land in question, or that a title by prescription can be acquired against the Crown. He also alleges that the grant to Bissot was revoked by the French Crown and abandoned by Bissot's successors in title. The company further rely on certain alleged acts of recognition by the Crown, which they contend preclude the Crown from setting up the said revocation and abandonment of the grant, or from denying its validity.

The judgment of the Superior Court affirmed the title of the Crown to the larger portion (about 250 miles) of the tract in dispute, leaving the company in possession of the rest. The river Agwanus or Gognish was taken as the dividing line, the Crown recovering all that lies to the east of that river, and the company keeping all that lies to the west.

Both parties appealed from the judgment, and the Court of Queen's Bench dismissed both appeals.

The basis of the company's claim is the alleged grant of the 25th February, 1661. It is necessary, therefore, in the first place, to examine the nature and extent of this grant. In 1627 a company, called the Company of New France (or of the *Cent Associés*) was formed, to which the King of France conceded the *pays de la Nouvelle France*, including the land in question, "*en toute propriété, justice et seigneurie*," with right to distribute the lands. The rights of this company were subsequently surrendered to the King, and by him ceded to a fresh Company, called "the Company of the West Indies;" but, in 1661, while the Company of New France retained its original powers, it made, on the 25th February of that year, a grant to François Bissot, under whom the Labrador Company claim as successors in title.

This grant is no longer in existence, the original document, as well as the copy supplied to Bissot, having been destroyed by fire. Before their destruction, however, François Bissot, on the 11th February, 1668, made an *aveu*, or declaration, to the Company of the West Indies, the successors of the Company of New France, setting forth the grant made to him by the last-named company in 1661. This *aveu* has been preserved, and it has been treated throughout these proceedings as containing a correct statement of the original grant.

This *aveu* is in the following terms:—

"François Bissot, Sr. de la Rivière, lequel avoue et déclare tenir de nos Seigneurs l'Isle aux Œufs, située au dessous de Tadoussac, vers les Montpellès, du costé du Nord, quarante lieues

ou environ dud. Tadoussac, avec le droit et faculté de chasse et d'établir en terre ferme aux endroits qu'il trouvera plus commodes, la pesche sédentaire des loups marins, baleines, marsouins, et les autres négoces, depuis la dite Isle aux Œufs jusqu'aux Sept Isles et dans la Grande Anse, vers les Esquimaux où les Espagnols font ordinairement la pesche, avec les bois et terres nécessaires pour faire le dit établissement. Le tout à luy appartenant par titre de concession en date du 25 Février 1661, signé par extrait des délibérations de la Compagnie de la Nouvelle France, A. Chefault, à la charge de payer par chacun an, deux castors d'hiver, ou dix livres tournois au receveur de la dite compagnie, et les droits accoutumés pour la traite à la communauté de ce pays, au bas duquel titre est écrit Dubois Danaugour, ratifié le don que dessus de laquelle dite déclaration il nous a requis acte et a signé. Ainsi signé, Bissot, avec paraphe.

"Sur quoy, ouï le procureur fiscal, nous avons accordé acte au dit sieur Bissot de son dit aveu et déclaration, et iceley condamné payer la dite redevance, tant pour le passé que pour l'advenir, suivant et conformément au dit titre de concession, sans néanmoins que le dit acte puisse être tiré à conséquence n'y préjudice, remettant au Roy ou à la compagnie de faire valoir le dit titre ou point. Mandons, &c.

"Donné par nous Louis Théandre Chartier, Escuyer, Seigneur de Lotbinière, Conseiller du Roy, Lieutenant-Général Civil et Criminel, à Québec, les assizes tenant le onzième jour de Février, 1668."

It is not disputed that this concession gave to Bissot the seigneurie of the *Isle aux Œufs*, situated some distance to the west of Cape Cormorant, the western boundary of the land now in question. The contest arises on the passage commencing "*Avec le droit et faculté de chasse, &c.*"

For the Crown it is contended that the effect of the grant is to give the seigneurie of the *Isle aux Œufs*, with the accessory right of hunting, &c., on the mainland within certain limits, the extent of which will be considered later. The company, on the other hand, contend that this grant gave a seigneurie, not only in the *Isle aux Œufs*, but in the territory on the mainland within the defined limits.

Their lordships are of opinion that this contention of the company is wholly untenable. They agree on this point with the opinion expressed by all the judges in the courts below, that the rights to be exercised on the mainland are only

accessory to the seigneurie of the island. They consist in the permission (not to take possession of a defined district on the mainland, but) to establish at such places as may be most convenient, fixed stations for the capture of seals, &c., with the privilege of taking the timber and land necessary for the establishment of such stations. This last-mentioned provision effectually excludes the idea that the whole land was conceded to Bissot in fee, in which case it would have been superfluous to give him the right to take the wood and land necessary for the stations. Further, the reservation of an annual payment of two beaver skins for the right to hunt and fish is stated by the Chief Justice Sir A. A. Dorion, in the judgment of himself and his colleagues, to be inconsistent with the hypothesis that a fief on the mainland was granted, and this appears also to have been the opinion of Mr. Justice Routhier, and it has not been controverted before this Board.

One fact remains to be noticed, tending strongly to negative the company's contention that a seigneurie on the mainland was conceded by the grant of 1661. That document contains no limitation inland of the supposed fief. It might therefore as well have been made the basis of a claim to the whole territory northwards forming part of *La Nouvelle France*, as to the land for six miles inland. A license to make stations for fishing and hunting, and trading with the natives in an unsettled country might naturally be given without fixing its limits inland, but it cannot be supposed that a fief would be created without some indication of what its boundaries were to be.

This leads to the consideration of the question, over what extent of territory on the mainland is the right of establishing stations for fishing, &c., conceded? It is thus defined: "Depuis 'la dite Isle aux Œufs jusqu'aux Sept Isles, et dans la Grande Anse, vers les Esquimaux où les Espagnols font ordinairement 'la pesche,'" that is "from the said Isle aux Œufs up to the 'Seven Islands, and in the great cove in the direction of the Esquimaux where the Spaniards usually fish." In English there can be no doubt this means that the fishing stations may be established in the land between the *Isle aux Œufs* and the Seven Islands, and also in the *Grande Anse*. It has, however, been contended that the proper construction of the French is different, and that the force of the word "*jusque*," is carried on to the word "*dans*," and that the passage has the same meaning as if it had run "*jusqu' aux Sept Isles et jusque dans la Grande Anse*." No

authority for this construction has been given, and all the judges in the court below, whose mother tongue is French, agree that the right of establishing a station in the *Grande Anse* is distinct from the right to make stations up to the Sept Isles. Mr. Justice Routhier says: "Ces derniers mots comprenaient-ils toute la terre ferme depuis les Sept Isles jusqu'à la Grande Anse? Je ne le crois pas, car, autrement, on aurait fixé l'étendue de la concession depuis l'Isle aux Œufs jusque dans la Grande Anse." And Chief Justice Dorion thus paraphrases the grant: "Que la concession était de l'Isle aux Œufs en seigneurie, et de plus le droit de faire des établissements de pêche et de chasse sur la côte Nord jusqu'aux Sept Isles, puis dans la Grande Anse vers les Esquimaux." Their lordships have no doubt that this is the correct interpretation of the grant, and that it conceded to Bissot no seigneurie on the mainland, but only a right to make establishments for fishing and hunting up to Sept Isles and also in the *Grande Anse*. Where that *Grande Anse* was situated will be considered hereafter.

It may be convenient at this point to refer, in order of date, to a map of 1678, which has been relied on as showing that a seigneurie on the mainland was recognized as belonging to Bissot. This map is described as one "pour servir à l'éclaircissement du papier terrier de la Nouvelle France," and was dedicated to the Minister Colbert by the Intendant Duchesneau. Upon this map is printed "Seigneurie du Sieur Bissot," stretching along the coast from a little east of the Sept Isles to a place about two-thirds along the "Isles de Mingan." These islands follow one another to a river along which is written "Esquimaux," and at a short distance eastward "Baye des Espagnols" is inscribed.

The bearing of this map on the question of boundary will, so far as is necessary, be referred to by-and-by. Its value as evidence of a seigneurie on the mainland is now the subject of consideration. The utmost effect that could be given to this map would be as evidence of reputation at the date it bears of the existence of such a seigneurie; but this must necessarily give way before the proof which the representatives of Bissot have supplied that this grant to him did not in fact concede a seigneurie on the mainland. But undue importance has been given to this inscription on the map. Bissot had, in fact, a seigneurie, namely, that of the *Isle aux Œufs* to which belonged as an accessory a right of making establishments for hunting, fishing,

&c., on the mainland. It was not necessary for the purpose of the chartographer that all this should be set out on the map. What was of importance to him was to indicate over what extent of coast Bissot exercised rights whatever they might be, and he did this by writing the words referred to. This interpretation is indeed impliedly adopted by Mr. Justice Routhier, who is most favorable to the contention of the Labrador Company. He says (Record p. 731), speaking of the right of continuing the establishment of Mingan, "Comme cette exploitation était un "accessoire de l'ancienne seigneurie de l'Île aux Œufs, il n'est "pas étonnant que depuis des temps reculés on l'ait appelée "seigneurie du sieur Bissot."

But it is contended on behalf of the Labrador Company, that, even if the grant of 1661 did not in itself create a seigneurie on the mainland in favour of Bissot, this effect was produced by an *Ordonnance* of Intendant Hocquart in 1733, and the subsequent action upon it by the French Crown.

This *Ordonnance* was pronounced in a suit instituted in 1732 by Pierre Carlier, the "Adjudicataire Général des Fermes Unies de France, et du Domaine d'occident," against the heirs of François Bissot (who had died in 1676), and the heirs of Sieurs Lalande and Louis Jolyet, to whom the seigneuries of the isle and islets of Mingan had been granted by the French Crown in 1679, calling upon them to show by virtue of what title they had taken possession of the territory occupied by them on the "terre du nord" (i.e., the mainland north of the St. Lawrence) below the river Moisy up to the Bay of the Spaniards.

The "Adjudicataire Général" did not dispute the title of Jolyet (deceased) to the Isles of Mingan, described in the grant of 1679 (Record, p. 225), as the "Islets du Mingan du côté du "nord et qui se suivent jusqu'à l'anse des Espagnols." He only required the title to anything claimed on the mainland. The seigneurie of the isles and islets of Mingan will therefore only be of importance in considering the question of boundary.

In answer to the demand of the "Adjudicataire Général" the defendants relied solely on the grant of 1661, under which they alleged they had formed establishments and had continual possession for 71 years, and they conclude by a specific claim to be maintained in the possession and enjoyment of the lands granted to François Bissot, deceased, "in accordance with the title of "concession of the 25th February, 1661."

In reply the "Adjudicataire Général," after taking the objec-

tion, not now insisted on, that the grant of 1661 was in conflict with certain earlier grants, said that, admitting the grant of 1661 and the declaration of 1668 as valid title deeds, and construing them in the sense most favourable to the defendants, the grant gave no proprietary title except on the Isle aux Œufs. On the mainland it conferred no right of ownership, but only the right to establish there "la pesche sédentaire," from l'Isle aux Œufs up to the Seven Isles and in the Bay of the Spaniards, "a right," he continues, "which it would have been useless to express, if the intention of the concession had been to give a right of property, and which by its expression positively excludes a right of property." He then presents substantially the arguments against the then defendants' claim, which have been repeated before this Board, and he proceeds, "Though the defendants have not even the right to make establishments in the tract of country from the Seven Islands up to the Bay of the Spaniards, it is in consequence of their title of concession that Bissot, deceased, has founded the establishment of Mingan continued by the defendants, for which they allege a continued possession of 71 years. Having regard to this long enjoyment of the seigneurie of Mingan, he will not dispute it, provided that they be limited to a concession of which the limits shall be certain and determined, so that they cannot injure or prejudice the 'Traites du Domaine du Roi.' It is at Mingan that they have fixed their establishment on the mainland. The Farmer-General will not offer opposition to the enjoyment of it being continued to them, and even that the property in it be accorded to them by a new title, if His Majesty should think fit to accord to them as recompense the establishments which they have made there." The Mingan here referred to as the place where the defendants are said to have fixed their establishment on the mainland is a station on the mainland opposite to the islands of Mingan, and is marked on several maps as the Mingan settlement.

The "Adjudicataire Général" concludes by demanding that he be maintained in his right, to the exclusion of all others, to exercise trading, hunting, fishing, and commerce in the tract of the domaine between l'Isle aux Coudres up to and including the river Moisy, that the defendants be condemned to pay him the arrears of the annual dues of two beaver skins or ten "livres Tournois" from 1661 to the then present year, unless they should prefer to give up ("se désister de") the said concession,

and consent to the reunion to the domaine of the said seigneurie of the Isle aux Œufs, which they long since abandoned, and moreover also to pay the dues for the trading which they had carried on at Mingan; and that the said defendants be bound to take a new title for the establishment made by them at Mingan aforesaid, to commence from Cormorant Point ("en allant") in the direction of the Bay of the Spaniards, with such depth and on (payment of) such dues as it should please His Majesty to accord them.

By way of rejoinder to the reply of the "Adjudicataire Général," the defendants reassert in general terms their claims, and ask whether their possession for 70 years, and the expenses they have been put to, and the losses they have suffered from the English in times of war, ought not to serve them in the place of title, and they conclude that though they have proved their right, they consent to the river Moisy being the western limit of their concession up to the Bay of the Spaniards, and therefore they pray that they may be relieved from the payment of the dues with which that territory is charged, and that they may be given a new title to it.

This was the state of the controversy which the Intendant Hocquart had to decide. After reviewing the pleadings, Monsieur Hocquart gave his judgment as follows:—

He took notice of the abandonment by the defendants of the territory conceded to François Bissot, deceased, by the Company of "Nouvelle France" on the 25th February, 1661, from the Isle aux Œufs up to the river Moisy, and in consequence, as far as was necessary, reunited to the domain of His Majesty the said territory conceded to the said François Bissot from and including the Isle aux Œufs to Cormorant Point, four or five leagues below the river Moisy; forbade the defendants and all others directly or indirectly to exercise any trading, hunting, fishing, commerce, or establishment in the territory so reunited, or in the said river Moisy and its affluent lakes and rivers; and, in consideration of the abandonment aforesaid by the defendants, he discharged them from any arrears which might be due from them, and "as to the new title of concession required by them for the establishment made by them and their predecessor François Bissot at the place of Mingan aforesaid, the parties shall apply to His Majesty to obtain the same, with such frontage and depth and on payment of such dues as His Majesty shall be pleased to grant."

The effect of this "Ordonnance" was entirely to put an end to the seigneurie in the Isle aux Œufs, and to the rights, whatever they were, which had been conceded to Bissot by the original grant, as far as Cormorant Point, and to reannex the district from and including the said Isle aux Œufs up to Cormorant Point to the domain of the King. This, with the remission of the arrears, was the whole operative part of the "Ordonnance." As to the request of the defendants that the limits of their concession should be from the river Moisy to the Bay of the Spaniards, and that of this district a new title should be granted to them, this was not acceded to. The district for five or six leagues eastward of the river Moisy was reunited to the Crown, and no mention whatever of the Bay of the Spaniards is made, and the defendants are remitted to the Crown to obtain a new title for "the establishment made by them and the said François Bissot, at the place of Mingan aforesaid," for such frontage and depth as His Majesty might think fit to grant.

François Bissot, the son, addressed several petitions for a new title to the Comte de Maurepas, the French Secretary of State. In these petitions he set out the substance of the original grant of 1661, explained that his father had made his first establishment at Mingan, where the family residence was formed, but that he had made many others at different places, which, after they had been destroyed by the English, had been from time to time re-established. He stated that the limits of the Royal domain had been fixed by Hocquart at Cormorant Point, and he prayed that he might be continued in the remainder of his concession from that point "down the river to the conceded lands" (by which appears to be meant, conceded to other persons), and the exclusive privilege of continuing there his establishments, and others if possible, for the hunting of seals, with the rights of hunting and trading with the savages such as he and his late father had enjoyed for 70 years.

The result of a correspondence which followed between the Comte de Maurepas and the Marquis de Beauharnois, the Governor of la Nouvelle France, and the Intendant Hocquart, was that the Comte de Maurepas stated, in a letter to M.M. de Beauharnois and Hocquart, that the circumstances of the case would have determined him to propose to the King to confirm the heirs of Bissot in the possession of a part of the coast conceded by the grant of 1661, and to fix their condition; but that, having regard to the existing circumstances of the family, and the dis-

cussions which such a confirmation might give rise to, he had taken the course recommended by M. M. de Beauharnois and Hocquart, to suspend all determination on the subject, and that he had only induced the King to agree that the heirs (of Bissot) should enjoy such extent of coast as they (Beauharnois and Hocquart) had designated in their letter, from the boundary of Tadoussac down the river to the concession of the Sieur Lafontaine, with such depth as they (Beauharnois and Hocquart) should think right to fix; and he concluded with a request that they would consider whether it would be convenient to leave them this extent of territory, or whether it would not be right to reduce it for the purpose of locating other concessionaries.

It does not appear that these suggestions of M. de Maurepas were ever communicated to the heirs of Bissot. No new title was ever granted to them. This letter imports no engagement on the part of the Crown to give one; it contains only the expression of a possible intention to do so if, upon the examination of this matter by M.M. Beauharnois and Hocquart, it should be thought expedient. No further action on the subject is shown. No boundary inland was ever fixed. All that can be inferred is that the representatives of Bissot continued to carry on their stations for fishing, &c., at Mingan as before. Their lordships, therefore, are of opinion that the judgment of Hocquart and the action of the French Crown upon it did not create or recognize any title in the heirs of Bissot to a seigneurie on the mainland.

Nothing between the date of M. de Maurepas' letter down to the cession of Canada to England in 1763, calls for observation. In 1766 the representatives of François Bissot laid before the British Government a claim to be proprietors of the "terre ferme de Mingan," commonly called "the seigneurie and post of Mingan." In support of their claim they do not appear to have furnished evidence of the contents of the grant of 1661, but they relied on an "Acte de Notoriété," signed by several citizens and notables of Quebec, two of whom, at least, were parties interested, to prove an immemorial possession of the seigneurie of the mainland of Mingan by the heirs of M.M. F. Bissot and Lewis Jolyet. This claim was referred to the law officers of the Crown in England, who, in the year 1768, reported upon it. After observing that "the claim is of an exclusive right of property in the soil containing originally, in extent along the "north shore of the River St. Lawrence from the Isle of Eggs

"to the Bay of Phellipeaux which appears to be about 500 miles, "and in depth into the country without bounds or limitation," but of which a space of about 30 leagues from Egg Island to Cape Cormorant was acknowledged to have been surrendered, the law officers comment on the uncertainty of the grant, as well as of possession, and they conclude, "Under these circumstances, "we are of opinion that this claim, standing as it does at present upon these papers, could not in any judicial inquiry be "allowed in point of law as valid and effectual; at the same time "there is reason to think that some part of this family has been "in some kind of legitimate and authorized possession of some "particular parts of the shore within the limits described, but "the ground, the nature and extent of such possession does not "appear at present in such authentic manner as to be capable "of receiving any judicial confirmation."

In 1781 the claimants appear to have endeavoured to supply the want of proof thus pointed out. On the 28th of May in that year F. J. Cugnet, on behalf of himself and others named, claiming to be seigneurs and proprietors in undivided shares of the seigneurial fiefs of the isles and islets of Mingan, of the isle of Anticosty, and of the "terre ferme de Mingan," is alleged to have presented an act of "foi et hommage" in respect of the said fiefs and seigneuries. A document of this date and to this effect is found in the register of "foi et hommage," and it states that the "Seigneurie de la terre ferme de Mingan," commencing at Cape Cormorant, "jusqu' à la grande Ance vers les Esquimaux où les Espagnols faisaient ordinairement la pêche sur "deux lieux de profondeur," was conceded by the Company (of La Nouvelle France) on the 25th of February, 1661, to the Sieur François Bissot. Appended to this document is a certificate of Cugnet himself (who appears to have held the office of keeper of the "Papier Terrier") that this "foi et hommage" had been presented, but it is not signed by the Governor, and therefore has no validity. But from its having been found in the registry it has since been frequently assumed, though erroneously, to have had an official character.

This document contains two statements which are now known to be untrue, whether wilfully or not, it is unnecessary to inquire. The one is that the grant of 1661 conceded a seigneurie from Cape Cormorant as far as the "Grande Anse." It omits altogether the mention of the "Sept Isles," and changes the language with regard to the "Grande Anse." The second is

that it introduces a limitation inland, thus supplying words which would meet the objection taken as to the uncertainty of the grant in this respect. It is said that these words are introduced in the margin of the document, but as the original is not before them, their lordships cannot verify the statement.

The effect of these inaccuracies, whether intended or not, was that in 1803 MM. Vondenvelden and Charland, surveyors, in a work on the subject of the titles of ancient concessions, include that of "la terre ferme de Mingan," on the authority of the supposed act of "foi et hommage" of 1781; and from this work the same error has been derived and continued in subsequent transactions. Thus in 1805, in an action at the suit of Ralph Rosslewin against one Crawford and others, the sheriff seized fifteen thirty-second undivided parts of the seigneurie of the Isles Mingan, "with all the rights in the seigniorie of the mainland of Mingan." The Procureur Général claimed the "droit de quint" due to the Crown on the sale. The matter was referred to the arbitration of M. Planté, an advocate, who gave his decision and based it upon the supposition that the grant of 1661 was a concession of the "terre ferme de Mingan" to Sieur Fr. Bissot, and refers for his authority to the false entry of the 28th May, 1781, in the register of "foi et hommage" and the work of MM. Vondenvelden et Charland. The demand and receipt on this occasion of the "droit de quint" by the Procureur Général has been relied on by the Company as a recognition by the Crown of their title to a seigneurie of the "terre ferme de Mingan." There is no proof that it was paid, but assuming that it was, it does not amount to a recognition by the Crown. A recognition to be effectual for the purpose of curing a defective title must be made with knowledge of the defects to be cured, and no such knowledge on the part of the Crown can in this case be inferred from the mere receipt by its officer of a fiscal due, under a mistake induced by the company's predecessors.

In 1837 James Stuart, on the part of several persons named, rendered faith and homage for, amongst other things, certain undivided shares in the "Seigneurie de la terre ferme de Mingan." On this occasion the act of faith and homage is signed by the Governor, Lord Gosford. This would be *prima facie* proof of the existence of some seigneurie on the mainland of Mingan, but this *prima facie* proof is rebutted by the title relied on by the claimants, namely, that supposed to be derived from the grant of 1661, and the "Ordonnance" of Hocquart of 1733. The effect of these documents of title has been already considered.

Nothing calling for observation occurred after 1837 until the year 1854. Down to this time their lordships are of opinion that the facts proved fail to establish that there was a seigneurie of the mainland of Mingan, or that the Crown had recognized its existence, although, chiefly from the supposed act of "foi et hommage" of 1781 containing the erroneous statement of the effect of the grant of 1661, a reputation had arisen that there was such a seigneurie.

With regard to the claim of the company to hold by prescription and immemorial possession, it is unnecessary to consider what would have been the effect of the evidence if the title of the company had rested on this basis alone, because as the true root of their title has been shown by the company themselves, there is no room for the application of the law of prescription. This is clearly stated by many authors of authority: "On ne peut pas prescrire contre son titre en ce sens que l'on ne peut pas se changer à soi-même la cause et le principe de sa possession * * * il suit de là que lorsque le titre est représenté, c'est par lui qu'il faut régler la cause et le principe de la possession; et tant que le possesseur ne prouve pas une intervention légale soit par le fait d'un tiers, soit par une contradiction formelle, le titre reste la loi invincible qui sert à qualifier sa possession. Il y est ramené sans cesse par la loi et par la raison. C'est ce que les praticiens ont voulu exprimer par ce brocard; *ad primordium tituli posterior semper refertur eventus.*" Troplong de la Prescription, 522, 4th ed.

In this state of things the legislature of the Province of Canada, deeming it expedient to abolish all feudal rights and duties in Lower Canada, passed for this purpose the Seigniorial Act of 1854 (18 Vict., c. 3), amended by the Act of 18 Vict., c. 103 (1855), and the Seigniorial Amendment Act of 1856 (19 Vict., c. 53). The 10th section of this last-mentioned Act is as follows: "Inasmuch as the following fiefs and seigniories, namely: Perthuis, Hubert, Mille Vaches, Mingan, and the island of Anticosti, are not settled, the tenure under which the said seigniories are now held by the present proprietors of the same respectively, shall be and is hereby changed into the tenure of 'franc alleu roturier'."

This is an absolute statement by the legislature that there was a seigneurie of Mingan. Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made

the legislature alone can correct it. The Act of Parliament has declared that there was a seigneurie of Mingan, and that thenceforth its tenure shall be changed into that of "franc aleu roturier." The courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination.

It remains only to consider what was the seigneurie of Mingan to which the Act of 1856 referred. It has been contended for the Crown that there was a seigneurie of the isles and islets of Mingan which may have been intended. The answer to this contention is that the proper name of this last-named seigneurie was that of "the isles and islets of Mingan," and that there is no trace of evidence that it has been on any occasion otherwise designated, or that it has ever been known as the *Seigneurie de Mingan*.

An examination of the Act further proves that a seigneurie on the mainland was contemplated.

The original Act provides for the appointment of Commissioners (Sec. 2), to whom (Sec. 4), the Governor shall assign the seigneurie or seigneuries in and for which each of them shall act, and whose duty it shall be (Sec. 5), "to value the several rights * * * with regard to each seigniory which shall be assigned to him as aforesaid."

By virtue of these provisions Henry Jullah, one of the Commissioners, had assigned to him the making of the *cadastre*, and the valuation of the rights of the seigneurie of Mingan, and he has discharged his duties specifically with regard to the "seigneurie of the *terre ferme de Mingan*," while on the other hand no mention has been made of the seigneurie of the isles and islets of Mingan.

Before beginning to prepare the schedule for any seigneurie it was the duty (Sec. 7 of the Act of 1854) of the Commissioner to give public notice of the place, day, and hour at which he would begin his enquiry; he had power to examine on oath any person appearing before him.

Immediately after the making of the schedule the Commissioner was bound (Sec. 11 of the Act of 1854, and Sec. 5 of the Act of 1856, to give eight days' public notice that such schedule would remain open for the inspection of the seignior and the *censitaires* of the seigniory during thirty days following the said notice, "and any person interested in the schedule may point out in writing any error or omission therein, and require that the same be corrected or supplied." Provisions are also made

for the revision of the schedule, and it is enacted (Sec. 8 of the Act of 1856) that no revision shall be allowed, unless application be made for the same within fifteen days after the Commissioner shall have given his decision under Sec. 11 of the Act of 1854; and by the 10th Sec. of the Act of 1855 it is enacted that "after any schedule shall have been completed and deposited under said Act, it shall not be impeached, or its effect impaired for any informality, error or defect in any prior proceeding in relation to it, or in anything required by the said Act to be done before it was completed and deposited, but all such prior proceedings and things shall be held to have been rightly and formally had and done, unless the contrary expressly appears on the face of such schedule; and the same rule shall apply to all proceedings of the Commissioners under the said Act, so that no one of them, when completed, shall be impeached or questioned for any informality, error, or defect in any previous proceeding, or in anything heretofore done or omitted to be done by the Commissioners or any of them."

It was open, therefore, to the Government on the one hand, or the persons claiming to be proprietors of the seigneurie of the *terre ferme* of Mingan, to have complained in due time and in the manner prescribed, of any error in the schedule. As no such complaint was made, the schedule as deposited must be deemed to be correct.

Now, by the schedule drawn up by Henry Judah (dated the 23rd January 1864) it is certified that the "*seigneurie de Mingan*" "*ou de terre ferme de Mingan*" is scheduled in the county and district of Saguenay, and is not conceded; it contains fifty leagues of frontage by two leagues of depth, extending from Cape Cormorant up to the river Goznish, forming an area of 705,400 *arpents*, and is bounded in front by the river St. Lawrence, and along its depth and two sides by the public domain.

This schedule, with the Act under which it was made, must now be deemed to have conclusively established the existence and boundaries of the *Seigneurie de Mingan* referred to in the 10th Section of the Act of 1856.

Mr. Justice Routhier by an independent examination of the evidence has arrived at the conclusion, in which their lordships entirely concur, that the territory in which the right to make establishments for fishing, &c., was granted by the Concession of 1661, did not extend further eastward than the river Goznish, and that there is no foundation for the claim to extend it to

Brador Bay in the strait of *Belle Isle*. Their lordships concur with Mr. Justice Routhier in thinking that the bay referred to in the grant of 1661 as that where the Spaniards ordinarily fished was not that which is now called Brador Bay, but was the one indicated as the *Baye des Espagnols* on the map, presumably drawn up on the information of *Sieur Jolyet*, an experienced navigator, and one of the parties having an interest under the Concession of 1661. This bay exactly answers the description given in the grant of 1679 to Laland and Jolyet of the seigniory of the isles and islets of Mingan, "which follow one another to the bay called *l'Anse aux Espagnols*, and to the position assigned to it in the map of 1678, near the eastward end of those islands and near a place or river marked "*Esquimaux*." It is, however, unnecessary to examine this question in detail, as their lordships are of opinion for the reasons already given, that the schedule drawn up by Mr. Judah is conclusive on the subject of boundary.

Their lordships will humbly advise Her Majesty that both appeals be dismissed, and that the judgment of the Court of Queen's Bench be affirmed, and they direct that the parties pay their own costs of the appeals.

The Solicitor-General, *Sir H. Rigby, Q.C.*, *H. Abbott, Q.C.*, of the Quebec Bar, and *Tyrrell T. Payne*, for the Labrador Company.

Sir Horace Davey, Q.C., *R. Laflamme, Q.C.*, (of the Quebec Bar), *M. Belleau, Q.C.*, (of the Quebec Bar) and *F. C. Gore*, for the Queen.

COURT OF APPEAL ABSTRACT.

Testament—Interprétation des lois—"Sain d'esprit"—Preuve—Captation.

Jugé, le Code exigeant à l'article 831, que le testateur soit "sain d'esprit," ne frappe pas de nullité seulement le testament du fou proprement dit, mais aussi le testament de celui dont la faiblesse d'esprit ne lui permet pas d'apprécier le caractère et les effets de l'acte qu'il accomplit.

La preuve d'un état mental semblable peut résulter, directement, des actes, du langage et de la conduite du testateur, avant, pendant, et après la confection du testament, et, indirectement de la nature de la disposition testamentaire et de sa portée, v. g., de son injustice.

Dans l'espèce, la testatrice quoique susceptible de concevoir une donation ou transport afin d'assurer sa vie, étant trop faible d'esprit pour connaître l'étendue de sa fortune, apprécier la nécessité d'une telle donation, se rappeler les avantages respectifs que ses enfants avaient reçus dans le passé, et se rendre compte de la position relative de chacun d'eux vis-à-vis de sa succession et de celle de son mari, n'était pas assez "saine d'esprit" pour pouvoir tester valablement.

Au surplus, le bénéficiaire, l'intimé, qui avait le contrôle des affaires de la testatrice et exerçait une grande influence sur elle, lui avait suggéré le testament, qui était le résultat de captation dolosive de sa part.—*Baptist & Baptist*, Québec, Lacoste, J.C., Bossé, Blanchet, (diss.), Wurtele & Tait, JJ., 5 mai 1892.

Bail—Prohibition de sous-louer—Cession de bail—Aliénation de la chose louée.

Jugé:—Le cessionnaire d'un locataire principal qui a sous-loué une partie des lieux loués, malgré une prohibition de sous-louer dans le bail, et qui a ensuite acquis du locateur principal la propriété de ces lieux, n'a pas d'action contre le sous-locataire pour le faire évincer avant l'expiration du sous-bail.—*Hough & Cowan*, Québec, Baby, Bossé, Blanchet, Hall, et Wurtele, JJ., (Bossé & Hall, JJ., diss.) 8 octobre 1892.

Libelle—Jurisdiction.

Jugé, que dans une action en dommages pour libelle publié dans un papier-nouvelles, le défendeur peut être poursuivi dans un autre district que celui de son domicile et du lieu de publication du journal, si le demandeur a limité les dommages qu'il réclame au seul district dans lequel il a assigné le défendeur.—*White & Langelier*, Sir A. Lacoste, J.C., Bossé, Blanchet, Hall, & Wurtele, JJ., Québec, 8 octobre 1892.

Loi électorale—Nullité de contrat—S. R. Q. 425—Preuve.

L'intimé, poursuivi par l'appelant sur billet promissoire, a offert en compensation un compte pour effets et marchandises allégués avoir été vendus et livrés à l'appelant et à sa demande et requisition spéciale. La preuve a démontré que ce compte se rapportait à une élection faite en vertu de la loi électorale de

Québec, et ne paraissait pas avoir été transmis à l'agent légal du candidat dans le délai d'un mois de la déclaration de l'élection, et de plus, que le dit compte n'avait pas été encouru pour l'appelant personnellement, ni pour rencontrer des dépenses légitimes de la dite élection, et que l'intimé connaissait l'objet pour lequel il vendait et livrait les dits effets et marchandises.

Jugé, qu'en vertu des dispositions de l'article 425 des Statuts Révisés de Québec, le dit prétendu contrat était nul, et le compte en question non recouvrable en loi. Sous les circonstances de cette cause, et en l'absence d'objection de part et d'autre, une preuve verbale et secondaire de la tenue de l'élection était suffisante.—*Brunelle & Begin*, Québec, Lacoste, J.C., Baby, Bossé, Blanchet, Hall, JJ., 6 mai 1892.

Inscription en faux—Acte signé hors la présence du notaire.

Jugé, Un acte notarie, daté et clos comme fait à Rimouski, mais qui a de fait été signé à Québec, où le notaire qui connaissait les signatures des parties, avait envoyé le projet de minute pour y être signé, est nul comme acte authentique.—*Cie d'assurance mutuelle etc., & Cedar Shingle Co.*, Québec, Lacoste, J.C., Baby, Bossé, Hall, Wurtele, JJ., 6 mai 1892.

Billet de location—Conditions d'établissement non accomplies—Délai accordé par Département—Cancellation par erreur—Complainte et réintégrande—S. R. Q. arts. 1269, 1273, 283, et seq.—Interprétation.

Jugé: Le droit de révoquer un billet de location pour cause est un droit absolu qui peut toujours être exercé par le commissaire des terres de la Couronne, lorsqu'il y a lieu, mais il ne peut pas y avoir révocation sans avis et sans publication par l'agent local, non plus qu'avant 60 jours de délai après l'affiche de l'avis. Cependant, lorsqu'une location octroyée par un agent local est répudiée par le Commissaire, ce n'est pas la révocation d'une location régulièrement faite, mais le refus par le Commissaire de ratifier le billet donné par l'agent; il n'est pas nécessaire, dans ce cas, de donner avis, et le refus de ratification rend sans effet le billet de location.

Si avant l'expiration d'un délai accordé pour l'accomplissement des conditions d'établissement, la location est annulée par erreur, le Commissaire a droit de retirer cette annulation et

remettre la partie dans la position qu'elle avait occupée auparavant, et comme conséquence de ne pas approuver un second billet de location accordé dans l'intervalle par un agent local.

Un porteur de billet de location, ainsi dépossédé par erreur, a droit à l'action possessoire pour se faire réintégrer,—le permis d'occupation étant un titre et une preuve *prima facie* de possession, aux termes de l'article 1270, par. 2, S. R. Q.—*Rocheleau & La Charité*, Québec, Lacoste, J.C., Baby, Bossé, Hall & Wurtele, JJ., 2 juin 1892.

Parishes—Canonical and civil erection and division—Jurisdiction of the Courts—R. S. Q. 3371-3381.

Held: 1. The civil courts in the province of Quebec have no jurisdiction to annul or revise a canonical decree erecting a parish, the only remedy being an application to the superior ecclesiastical authority.

2. The courts have no jurisdiction to revise the proceedings of commissioners for the civil recognition of parishes, this being a matter within the sole jurisdiction of the executive of the province, and the commissioners being merely a commission charged to make such inquiry and report as may enable the lieutenant-governor to act with proper knowledge of the facts.—*Samoisette et al. & Brassard et al.*, Montreal, Lacoste, C.J., Baby, Bossé, Hall and Wurtele, JJ., December 23, 1892.

Grand Jury—Récusation du tableau—Récusation par tête ("to the polls").

Jugé, la procédure criminelle dans cette Province ne reconnaît pas aux accusés le droit de récuser le Grand Jury, ni par voie de récusation du tableau (*challenge to the array*), ni par voie de récusation individuelle (*challenge to the polls*).—*Regina v. Mercier et al.*, au Criminel, Bossé et Blanchet, JJ., Québec, 12 octobre, 1892.

SUPERIOR COURT ABSTRACT.

Jury trial—Verdict against evidence—Non-suit.

- *Held*: 1. Absence of evidence to support a verdict is not ground for rendering judgment *non obstante veredicto*.

2. The judge presiding at the trial has no power to non-suit a plaintiff, save in the two cases provided for by Arts. 394, 395,

C. C. P., that is, either where the plaintiff does not appear at the time and place fixed for the trial, or where, having so appeared, he at any time during the trial and before verdict withdraws from court or abandons his suit, the effect of such non-suit being in either case to dismiss plaintiff's action, but permit his beginning anew.—*Turnbull v. Travellers' Insurance Co.*, Montreal, in Review, Lorranger, Ouimet, Doherty, JJ., November 30, 1892.

Expropriations—Cité de Montréal—Rôle des Commissaires—Etat produit par la Cité.

Jugé, que dans les expropriations sous la charte de la cité de Montréal, les commissaires jouent le rôle d'experts jurés, et ils peuvent accorder à l'indemnitaire moins que le montant porté à l'état produit de la part de la cité.

Que cet état ne constitue pas une reconnaissance par la cité de Montréal, mais n'est que l'expression de l'opinion de leurs témoins.—*Cité de Montréal et Dumaine*, C. S. (en Révision), Johnson, Davidson et Pagnuelo, JJ., Montréal, 30 décembre, 1892

Banque—Taux de l'intérêt—Répétition de l'indu—Question d'ordre public.

Jugé, que les banques ne peuvent charger sur les billets qui leur sont présentés pour escompte qu'un intérêt de sept par cent par an.

Que la prohibition de la loi, en cette matière, étant d'ordre public, celui qui a payé à une banque un intérêt dépassant le taux fixé par la loi, a droit de répéter de la banque le montant de l'excédant.—*La Banque de St. Hyacinthe*, v. *L. Sarrazin et al.*, Pagnuelo, J., C. S., St. Hyacinthe, juin, 1892.

Propres de communauté—Succession—Co-héritier—Acquisition de parts immobilières—Renonciation à succession—Enregistrement—Arts. 1279 et 2126, C. C.

Jugé, 1. La renonciation à une succession qui n'a pas été enregistrée est sans effet à l'égard des tiers, et notamment des créanciers du renonçant.

2. L'acquisition par des conjoints des droits mobiliers et immobiliers des co-héritiers de l'un d'eux dans une succession di-

recte, attribuée à ce dernier, comme propres, les parts d'immeubles acquises, sauf indemnité envers la communauté, s'il y a lieu, et ce, à plus forte raison, lorsque, dans l'acte d'acquisition, les portions d'immeubles sont désignées.—*Gagnon et Valentine, es qual., et Gagnon, es qual.*, Oppt., en Révision, Casault, Caron et Andrews, JJ., Québec, 31 mars, 1892.

Cautionnement pour frais.

Jugé, qu'une ordonnance d'un Juge en chambre, condamnant le demandeur à fournir cautionnement pour frais, parcequ'il n'a pas sa résidence dans la province (Art. 29, C.C.), peut être révisée par le tribunal, et le demandeur déchargé de cette obligation.—*De Angelis v. Masson et al.*, C. S., Mathieu, J., Montréal, 27 octobre, 1892.

Sale—Malicious seizure—Damages.

Held, 1. That an agreement by which the defendant transferred to plaintiff a barge for \$300, whereof \$50 were payable in July following, \$50 in September, and the balance in annual instalments of \$50, and which stipulated that in default of payment of the instalments as they became due the defendant would be at liberty to take back the barge, is a sale and not a lease.

2. That a *saisie-gagerie* seizing the barge under such pretended lease, was issued maliciously and without probable cause; and vindictive as well as real damages may be allowed in such case.—*Lamirande v. Cartier*, in Review, Taschereau, Loranger, Doherty, JJ., Montreal, January 30, 1892.

Révision—Montant des dommages—Bail—Obligations du locateur—Fuite d'eau.

Jugé, 1. La Cour de Révision peut modifier les jugements qui lui sont soumis quant au montant des dommages accordés, lorsque la nature de l'action en rend la détermination précise possible. La règle établie par la Cour Suprême (vol. VI., p. 482, *Levi et Reed, &c.*) que "l'appréciation du tribunal de première instance doit être finale, hors le cas où la condamnation est excessive au point de constituer une erreur évident ou une injustice," ne s'applique qu'aux actions, comme celles d'injures, où la détermination des dommages est laissée à sa discrétion.

2. Le locateur est responsable des dommages causés au locataire de la partie inférieure d'un édifice, par une fuite d'eau dans l'étage supérieure.—*Bernard v. Côté*, C. S. (en révision), Casault, Caron, Andrews, JJ., Québec, 31 mars, 1892.

Assignment—Compagnie étrangère incorporée.

Jugé, Que dans le cas d'une assignation faite à une compagnie ayant son principal bureau d'affaires dans la province d'Ontario, en parlant à son agent, sur une exception à la forme niant la qualité de l'agent à qui l'huissier a parlé, c'est au demandeur à prouver cette agence.—*Schultze v. Thorold Felt Goods Co.*, C. S., Mathieu, J., Montréal, 14 novembre, 1892.

Vente—Obligation—Enregistrement.

Jugé, Que, par la disposition du dernier alinéa de l'article 2098, C. C., prise conjointement avec l'article 2043, C. C., l'hypothèque consentie par le possesseur à titre de propriétaire, et enregistrée avant l'enregistrement de son titre, prime l'hypothèque du vendeur qui n'a enregistré qu'après cette hypothèque et après les trente jours de la date du titre.—*Huet dit Dulude v. Alphonse Laporte dit Denis*, et *N. J. Laporte dit Denis*, créancier colloqué, et *Alexandre Laporte dit Denis*, créancier-contestant, C.S., Mathieu, J., Montréal, 8 novembre, 1892.

Jury trial in civil cases—Absence of jurymen—Postponement—Alias venire facias.

The postponement of the trial on account of the absence of certain jurymen, is not a sufficient reason for the striking of a new jury; but in such case the issue of an *alias writ of venire facias* will be ordered, to summon anew, for a later day, the jury already struck.—*Ôuellet v. City of London Fire Ins. Co.*, Quebec, Andrews, J., June 30, 1892.

Capias—Secretion—Chose jugée—Costs.

Where a *capias* is based on a judgment, the question of indebtedness as fixed by the judgment is *chose jugée*, and the defendant is precluded from questioning the correctness of the amount so found to be due by him.

A sale by a restaurant-keeper of his effects and business and the leasehold of his restaurant, will not sustain a charge of sequestration, if it be established by him that he acted with the concurrence of his lessors, his principal creditors, who had the right at any moment to sell him out and take the proceeds by privilege for rent due, and who received the price in payment of their claim. But where the defendant acts thus, without the knowledge of his other creditors, no costs will be allowed him on the quashing of a *capias* issued by one of them.—*Cushing v. Fortin*. Montreal, Davidson, J., June 27, 1892. Confirmed in Review, Johnson, C.J., Tait and Doherty, JJ., November 30, 1892.

Will—Captation—Suggestion.

The testator, aged 66, and for many years clerk of the Crown and of the Peace at Montreal, being seriously ill with rheumatism and Bright's disease, and being warned by his physician to settle his temporal affairs, instructed his notary to prepare a will in accordance with memoranda written with his own hand. He kept the draft under examination for several days, and made a number of alterations. The will contained several bequests, but left the bulk of his fortune to his sister and her sons, defendants. Recovering partially from his illness, the testator lived 21 months after the execution of the will, and during the greater part of this time attended his office, and was competent for the performance of his duties. He also attended as usual to his private affairs. His sister, the defendant, had lived with him for some time before and after the date of the will, but it did not appear that she had brought any pressure or influence to bear upon him, or that he was not free to alter the dispositions of the will, if he so desired.

Held, that the proper inference from these facts was that the will was the expression of the testator's voluntary wishes, and should be maintained.—*Schiller v. Schiller*, Montreal, Davidson, J., June 30, 1892.

Libel—Allegations in petition—Justification.

The defendants, for the purpose of obtaining the liberation of L., brother of two of them, who was under arrest on a false charge of lunacy, presented a petition to a judge, supported by

affidavits, containing statements respecting plaintiff, which were relevant to the purpose of the petition, and were moreover substantially true, and had been generally known for two months previously. The petition was maintained, and the magistrate's commitment quashed. In an action of damages based on the statements contained in the petition and affidavits :

Held, that the defendants having acted in good faith and on a privileged occasion, and their allegations being relevant and made with probable cause, the plea of justification was established, and the action should be dismissed.—*Legault v. Legault*, Montreal, Davidson, J., June 30, 1892.

Shipping—Charter party—Date fixed for sailing—Breach.

A cattle shipper engaged the cattle space of a steamship for the transportation of cattle from Montreal to England, one of the stipulations of the contract being, "vessel to sail about 15th of May next." The ship's agent gave notice on May 16, that the vessel would be ready to load on May 21.

Held, that there was a failure to comply with the conditions of the contract, and that the shipper was justified in treating the agreement as cancelled and in refusing to load.

2. An action may be brought on a contract by the principals though the contract was made by their agents in their own name and without disclosing their principals.—*Mackill v. Morgan et al.*, Montreal, Davidson, J., June 30, 1892.

Sale—Apparent defect—Examination of goods by buyer—Reasonable diligence.

Where herring was sold without warranty, subject to inspection, and the buyer, after obtaining delivery on the 18th November, deferred all examination of the fish until the 30th November, and did not make a complete inspection until the end of December following, *held*, that he was not entitled to recover the price of fish then found to be rusty, rust on fish being an apparent defect, which might have been discovered by inspection if the fish had been examined at the time of delivery.—*Fraser v. Magor*, Montreal, Pagnuelo, J., October 25, 1892.

Carrier—Right of retention for payment of carriage—Art. 1679, C. C.

A carrier who has put the thing transported in the particular place specified in the contract of carriage, is not considered to have thereby dispossessed himself of it; and his right of retention under Art. 1679, C. C., until he is paid for the carriage, still exists, and may be asserted by conservatory seizure against parties claiming title by purchase.—*Groulx v. Wilson*, Montreal, in Review, Johnson, C.J., Gill and Mathieu, JJ., October 8, 1892.

Delay for appealing to the Supreme Court—Long vacation—Discretion of Judge—Acquiescence.

Held, 1. That the delay prescribed under section 40 of the Supreme Court Act runs during the long vacation.

2. That where the defendants had been unnecessarily dilatory in applying for the exercise of the discretion of the judge under sec. 42, the reason alleged being that they had overlooked the fact that the above mentioned delay runs during the long vacation, the judge will not allow the appeal.

3. The fact of entering into negotiations as to the execution of a judgment, constitutes an acquiescence in the judgment.—*A. H. Murphy v. J. J. Williams*, S. C., Pagnuelo, J., Montreal, December 13, 1892.

Exécution forcée—Vente immobilière—Désignation—Cadastre—Dation en paiement—Délivrance—Action pétitoire.

Jugé: 1. L'acquéreur d'un immeuble qui n'en a pas eu la possession, peut agir au pétitoire en invoquant le titre et la possession de son auteur.

2. La délivrance de l'immeuble n'est requise, pour rendre la dation en paiement parfaite, qu'entre le cédant et l'acquéreur, et les tiers ne sont pas reçus à en invoquer le défaut.

3. La vente par le shérif d'un immeuble sous un numéro cadastral, mais avec une désignation par tenants et aboutissants qui comprend un autre immeuble désigné au cadastre sous un autre numéro, ne donne pas à l'adjudicataire un titre à ce deuxième immeuble.—*Caron v. Houle*, en Révision, Casault, Caron, Andrews, JJ., 31 mars, 1892.

Vente mobilière—Tradition—Possession.

Jugé, dans le cas de vente de meubles par un même vendeur à deux personnes différentes, l'acheteur qui est en possession actu-

elle et de bonne foi doit être préféré, même si son titre d'acquisition est postérieur à celui de l'autre acheteur, et lors même que ce dernier aurait eu tradition.—*Drouin v. LeFrançois*, Cour de Circuit, Routhier, J., Québec, 6 avril, 1892.

*Mandamus—To compel mayor of municipality to sign contract—
Resolution of council.*

Held, that a *mandamus* will not be granted, to compel the mayor of a municipality to sign a contract with the petitioner in pursuance of a resolution of the council, when it appears that before the proceedings were instituted the resolution authorizing the mayor to sign had been rescinded by the council, and the contract awarded to another company.

2. Even if such subsequent resolution be annulable, it cannot be annulled on a petition for *mandamus* against the mayor of the municipality to compel him to sign the original contract.—*Edison General Electric Co. v. Barsalou*, Montreal, Doherty, J., January 7, 1892.

Will—Form of—Legacy—Vagueness and uncertainty.

Held: 1. The 14th Geo. III. cap. 73, sec. 10, in force in February, 1865, and which provides "that it shall be lawful for every person.....to deviseby will.....executed either according to the laws of Canada or according to the forms prescribed by the laws of England," is not to be read as restricted to wills made in the province, but applies to wills generally wherever made. Therefore, a will made at that time in the State of New York by a person domiciled in this province, in the holograph form, is good and valid.

2. A bequest in the following words: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, is not void for vagueness or uncertainty.

Semble, there is power in the Court, where a trustee empowered to select beneficiaries under a legacy from a class, fails to do so, to order an equal distribution of the amount of the legacy among those who compose the class.—*Ross v. Ross et al.*, S. C., Andrews, J., Quebec, September 26, 1892.

QUEEN'S BENCH DIVISION.

LONDON, November 3, 1892.

TATAM v. REEVE, 67 L. T. Rep. (N.S.) 683.

Gaming—Action for money paid in payment of lost bets upon request of losers.

The plaintiff, upon the request of the defendant, paid for the defendant certain sums of money to certain persons. These sums were for bets on horse-races lost by the defendant, as the plaintiff knew.

HELD: *that the plaintiff was not entitled to recover, as the payments were made "in receipt of" agreements rendered null and void by 8 and 9 Victoria chapter 109, and by section 1 of the Gaming Act of 1892, no action could be maintained for the recovery thereof.*

LORD COLERIDGE, C. J.:—I confess I have no hesitation at all in deciding this case, and it seems to me that judgment must be given for the defendant. If a person with full knowledge of what is called a debt of honor choose to trust another he must do so at his own risk, and with the knowledge that he must suffer if the person he has trusted choose to repudiate his debt. The old act (the 8 and 9 Vict., chap. 109) was discussed in the case of *Read v. Anderson*, 10 Q. B. Div. 100; 13 id. 779, in which Lord Esher, M. R., emphatically dissented from the other members of the court. In that case the Court of Appeal decided that when a commission agent was employed to make bets on behalf of his principal, and where it was admitted that if the bets had been made between principals only, the contracts would have been null and void under the statute, yet that an implied contract arose and could be enforced for repayment to the agent of the sums which the agent had paid for his principal. I entirely agree with the dissent of the master of the rolls in that case, for that decision really cut into the Gaming Act (8 and 9 Vict., chap. 109), as it was a decision that a person might do by means of another what he was prohibited from doing himself. However that was the decision of the Court of Appeal, and that was an end of it. Then there was an act of Parliament passed in the present year to amend this act (8 and 9 Vict., chap. 109), and this act enacts that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the 8 and 9 Victoria, chapter 109, or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract, or of any services in relation thereto, or in

connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." Now the facts here are that the plaintiff was desired by the defendant to pay certain sums of money mentioned in a slip, and the plaintiff did so pay these sums, and as a matter of fact, these sums were for bets made and lost by the defendant. Now, it was argued that these sums were not paid in respect of bets. I cannot agree with that contention. True, they were not paid "under" an agreement rendered null and void by the 8 and 9 Victoria, chapter 109, as there was no betting between the plaintiff and the defendant, but they were paid "in respect of" these betting agreements. In respect of what were these payments made by the plaintiff, except to discharge the sums which the defendant owed under these betting contracts? I decide this case with the less hesitation, as I think the plaintiff was not ignorant of the purpose of these payments. If the plaintiff had been deceived into making payments in respect of a matter he knew nothing whatever about one would have hesitated and been sorry to come to the conclusion to which I have come in this case. I think however that the plaintiff knew very well the nature of the transactions, and therefore he must take the risk of the defendant refusing to repay him the sums he has paid. I am of opinion therefore that there should be judgment for the defendant.

WILLS, J.:—I am of the same opinion. The chief argument of the plaintiff's counsel was based on the assumption that the only object of the statute 55 Victoria, chapter 9, was to get rid of the effect of the decision in *Read v. Anderson, ubi supra*. If that were the only object of the statute, then it would not touch the present case, as the plaintiff here did not make the bets which he paid, and so the case is not the same as *Read v. Anderson, ubi supra*. During the argument I asked the learned counsel for the plaintiff what meaning was to be given to the words "in respect of" as well as the word "under," for the word "under" would have done, and would have been sufficient if the Legislature had thought that the only object was to get rid of *Read v. Anderson, ubi supra*. The answer was given by both the learned counsel for the plaintiff that the words "in respect of" were equivalent to "under," and meant no more. I do not think that is so, and it must be that the words "in respect of" mean something different from the word "under." I do not think it makes any difference whether the plaintiff knew or did not

know that these payments were for bets, because whether he knew or did not know, they were equally made "in respect of" an agreement null and void by the 8 and 9 Victoria, chapter 109. If the plaintiff had been misled by the defendant, then it might well be that the defendant would have been estopped from setting up this defence. It is not necessary to decide that point, as on reading the affidavits, I cannot doubt, and I have not the slightest doubt in my mind, that the plaintiff knew what these payments were for. I think therefore that there must be judgment for the defendant.

MR. JUSTICE SEDGEWICK.

Mr. Robert Sedgewick, Q. C., deputy minister of justice, has been appointed a puisné justice of the Supreme Court of Canada, to fill the vacancy caused by the death of Chief Justice Ritchie and the appointment of Mr. Justice Strong as Chief Justice.

Mr. Sedgewick was born on May 10, 1848, in Aberdeen, Scotland. His father, the Rev. Dr. Sedgewick, was a pastor of the Presbyterian Church. Mr. Robert Sedgewick entered the law office of the late Mr. John Sandfield Macdonald at Cornwall as a student. In 1872 he was called to the Bar of Ontario and in the following year to the Bar of Nova Scotia, taking up practice in Halifax where he became Recorder. In 1880 he was appointed Q. C. He was vice-president of the Nova Scotia Barristers' Society and lecturer on jurisprudence in the Dalhousie Law School. He was president of the Alumni Association of Dalhousie College and one of the governors. In 1888 he was made Deputy Minister of Justice at Ottawa. "During his five years' tenure of office," says an Ottawa letter, "Mr. Sedgewick has been, perhaps, the hardest worked officer in the service of Canada and has discharged the important and onerous duties of the office with full acceptance. All important matters of administration and legislation focus in the Department of Justice, and such was the part taken in their settlement by Mr. Sedgewick that he may be said to have shaped the course of many important matters. He has represented Canada before the Judicial Committee of the Privy Council, and was sent to Washington in connection with Behring Sea matters a few years ago. He had a great deal to do in drafting the act of 1890 respecting bills of exchange and promissory notes and the criminal code of 1892.

Possessed of ability and experience coupled with a training in an office where he often performed the function of a judge, Mr. Sedgewick's appointment to the highest court in the land is regarded as a promotion well earned."

GENERAL NOTES.

THE LAW JOURNAL (LONDON).—The *Law Journal*, at the beginning of the year, has enlarged its page and columns, and assumed a large quarto form. Several improvements in typography and make-up have also been introduced. The *Law Journal*, which has entered on the twenty-eighth year of its existence, is a worthy representative of the English Bar, and deserves the wide support which it has received from the profession.

VERDICT SET ASIDE.—A new trial is seldom ordered on the ground that the verdict was against the weight of evidence, for a jury are not often so utterly wrong-headed as to give a verdict which no reasonable men could properly find. The verdict of a Liverpool special jury in *The Bruce Sailing Ship Company v. The London Assurance Association* had, however, last week, the inglorious distinction of being set aside as wholly unreasonable. Then the question arose whether judgment should be entered for the appellants, or the case sent back for a second trial. The respondents' counsel stated that his clients might, if there were a new trial, call some additional witnesses who had appeared at a wreck inquiry in America. With the consent of the parties the depositions of these witnesses were read. The Court thought that the proposed evidence might possibly strengthen the respondents' case, and therefore ordered a new trial. On no other ground, apparently, could the Court have refrained from entering judgment for the appellants, for if a verdict be one which no reasonable jury could find, it obviously would be useless to submit the case to a second jury on the same evidence as before. One other point deserves to be noticed. According to the report of *Solomon v. Bitton* (8 Q. B. Div. 171), the granting of a new trial ought not to depend on the question whether the judge who tried the action was dissatisfied with the verdict. In the present case the learned judge had reported against the verdict, and the Court held that his opinion, though, of course, not conclusive, was a matter which they ought to take into consideration in coming to a conclusion. We are glad to find that this is good law. It is certainly good sense.—*Law Journal (London)*.

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SUPREME COURT OF CANADA.

OTTAWA, Dec. 13, 1892.

Manitoba.]

MANITOBA FREE PRESS COMPANY v. MARTIN.

Libel—Personal attack on Attorney-General—Pleading—Rejection of evidence—Fair comment—General verdict—New trial.

In an action for a libel contained in a newspaper article respecting certain legislation, the innuendo alleged by the plaintiff, the Attorney General for the Province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence (plaintiff's counsel objecting), to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants; and in answer to the trial judge who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal for an order for a new trial:

Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but as it had been received evidence in rebuttal was improperly rejected; the general finding for the de-

fendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty; for these reasons a new trial was properly granted.

Haegel, Q.C., for the appellant.

Ewart, Q.C., for the respondent.

Ontario.]

ATTORNEY GENERAL OF ONTARIO v. THE VAUGHAN ROAD COMPANY.

Statute—Application of—R. S. O. (1887) c. 159—53 V., c. 42—Application to Company incorporated by special charter—Collection of tolls—Maintenance of road—Injunction.

The provisions of the general Road Companies Act of Ontario (R. S. O. (1887), c. 159, as amended by 53 V., c. 42), relating to tolls and repair of roads, apply to a company incorporated by special acts, and on the report of an engineer, as provided by the General Act, that the road of such company is out of repair, it may be restrained from collecting tolls until such repairs have been made.

Judgment of the Court of Appeal on motion for interim injunction (19 Ont. App. R. 234) over-ruled, and that of the Divisional Court (21 O. R. 507) approved.

S. H. Blake, Q.C., and *Lawrence*, for the appellants.

Bain, Q.C., and *Kappele*, for the respondents.

Nova Scotia.]

NOVA SCOTIA CENTRAL RY. CO. v. HALIFAX BANKING CO.

Mortgage—Railway bonds—Security for advance—Second mortgagee—Purchase by—Trust.

W. having agreed to advance money to a railway company for completion of its road, an agreement was executed by which, after a recital that W. had so agreed and that a Bank had undertaken to discount W.'s notes indorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company, with which they were deposited, and sell the same to the best advantage, applying the proceeds as set out in the agreement.

The railway company did not repay W. as agreed, and the bank obtained the bonds from the trust company and having threatened to sell the same the company, by its manager, wrote to E. and W. a letter requesting that the sale be not carried out, but that the bank should substitute E. and W. as the attorney irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done the company agreed that E. and W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the monies advanced. E. and W. agreed to this, and extended the time for payment of their claims, and made further advances, and, as the last mentioned agreement authorised, they re-hypothecated the bonds to the bank on certain terms.

At the expiration of the extended time the railway company again made default in payment, and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained.

Held, affirming the decision of the Court below, that the bank and E. & W. were respectively first and second incumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell, or E. & W. to purchase, under that sale.

Held, further, that if E. & W. should purchase at such sale they would become absolute holders of the bonds and not liable to be redeemed by the company.

Held, also, that the dealing by the bank with the bonds was authorised by the Banking Act.

Henry, Q.'., and *Newcombe* for the appellants.

Borden, Q.C., and *Russell, Q.C.*, for the respondents.

Ontario.]

WATEROUS ENGINE WORKS CO. v. TOWN OF PALMERSTON.

Municipal Corporation—Contract under seal—By-law—Executory contract—Enforcement.

In pursuance of Sec. 480 of the Ontario Municipal Act (R. S. O. 1887, c. 184) empowering any Municipal Council to purchase fire apparatus, the Council of the Town of P., by resolution,

authorised the Fire and Water Committee to ascertain the price of a fire engine, and on the committee's report recommending the purchase a contract was entered into under the corporate seal of the council for the construction of an engine by the Waterous Co. No by-law of the corporation was passed authorizing or sanctioning such contract. The engine was built and placed in the town Hall and a committee of the council was appointed to engage experts to test it. The test was made and the experts reported favorably upon it, but the council afterwards passed a resolution that all negotiations in reference to the purchase be dropped, and that the company be notified to remove the engine from the town hall. An action was brought against the municipal corporation for the contract price of the engine and hose, on the trial of which the presiding Judge found as a fact that the engine had answered the test and fulfilled the requirements of the contract, but held that the contract could not be enforced for want of a by-law. This judgment was affirmed by the Divisional Court (20 O. R. 411), and by the Court of Appeal (19 Ont. A. R. 47).

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the engine not having been accepted by the corporation the contract was not executed; that sec. 282 of the Municipal Act requires all powers of the corporation to be exercised by by-law unless otherwise expressly authorized or provided; that the authority to purchase fire apparatus is expressly given to municipal corporations by the Act, and is a power to be exercised by by-law under said section, and the contract being executory the want of a by-law was a bar to the action.—*Bernardin v. North Dufferin* (19 Can. S. C. R. 581) distinguished.

Held, per Gwynne J.—That the powers to be exercised by by-law are only legislative powers, and a contract such as that in question in this case could be enforced without a by-law.

Appeal dismissed with costs.

Wilkes, Q. C., for appellants.

A. M. Clark, for respondents.

Ontario.]

DRAPER v. RADENHURST.

Title to land—Purchase at tax sale—Cloud upon title—Agreement for quit-claim deed—Payment for deed—Right to monies paid.

J. R. died leaving all his estate to his widow, and in the event of her death without having made a disposition thereof, to his surviving children. The estate having become involved an absolute deed of all the real estate was executed in favour of one of the testator's children by the widow and other children, the grantee undertaking to pay off the liabilities and improve the estate, and on being repaid all amounts advanced for that purpose she was to re-convey the lands to all the heirs in equal proportions. The grantee managed the estate for several years, but was finally obliged to surrender it to trustees for benefit of creditors, it then owing her some \$18,000.

A portion of the estate conveyed by the said deed was sold for taxes, and the purchaser wished to obtain quit-claim deeds from the heirs of J. R., the original testator, to perfect his title, and also to obtain title to 100 acres of timber land belonging to the estate of J. R., which was not included in the assignment for benefit of creditors. Similar quit-claim deeds had previously been given for portions of the lands, and the monies paid for the same were distributed in equal proportions among the surviving children and grandchildren of the testator, and in this case the deeds were prepared and executed by the heirs in favour of the purchaser at the tax sale. Before the money agreed to be paid for the same was received, however, the above mentioned deed executed by the widow and children of the testator, which had been mislaid for several years, the grantee under it having died, was discovered, and the children of the grantee claimed the whole of the said money, and an action was brought by the other heirs for their respective shares of the same. On the trial judgment was given in favour of the plaintiffs, the trial judge holding that an agreement was proved between the parties that the money should be equally divided. This decision was affirmed by the Divisional Court, but reversed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that the purchaser at the tax sale paid the money in order to obtain a perfect title, and as the defendants were the only persons who could give such title, the legal estate being in them, the plaintiffs

could not claim any part of the money, no agreement with the defendants to apportion it being proved, and any agreement made by the plaintiffs with the purchasers not being binding on the defendants.

Appeal dismissed with costs.

Marsh, Q. C., for the appellants.

Donovan, for the respondent.

British Columbia.]

WEBSTER v. FOLEY.

Master and servant—Defective system in using machinery—Injury to workman—Liability of master—Notice to master. .

F. was employed in a sawmill at Vancouver, B. C., as a chainer, and worked on a rollway, which is the portion of the machinery of the mill along which the logs are brought to the saw carriage. One of his duties was to put a chain under the log and roll it on to the carriage, and while doing so, on one occasion, a log rolled down the rollway and against one behind him, and crushed him against the carriage, causing severe injuries for which he brought an action against W. & E., the owners of the mill.

On the trial it was shown that chock blocks were used to check the log in its course down the rollway, which had a slope of from 5 to 7 inches in its length of 12 ft., and that the blocks were only sufficient to hold one log. The jury found that the accident was due to the slope of the rollway and defective chock blocks; that F. could not have avoided the injury by exercise of proper care and skill in discharging his duties; that he had complained of the chock blocks to the proper persons who promised to make them good; that W. & E., the owners, were not aware of the defects, but that W., the manager and foreman, should have taken cognizance of the matter, and did not appear to have exercised due care; and they assessed damages to F. at \$5,000. The trial judge reserved judgment, and a motion was afterwards made on behalf of F. for judgment, and a cross-motion by defendants to set aside the findings, and for a non-suit. Eventually judgment was entered against W. & E. for the damages assessed, which was sustained by the Court in banc.

Held, affirming the decision of the Supreme Court of British Columbia, that the employers were no less responsible for the

injuries occasioned to F. by the defective system of using their machinery than they would have been for defect in the machinery itself.

Held, further, that there being no Employers' Liability Act in force in British Columbia, when the injury happened, F. was not precluded from obtaining compensation by failure to give notice to his employers of the defect in the chock blocks.

Appeal dismissed with costs.

Cassidy, for appellants.

Ewart, Q. C., for respondent.

Ontario.]

BOOTH v. RATTE.

Practice—Master's office—Reference to assess damages—Severance of damages—Reasons for report—Judgment of Court—Equal division—Withholding judgment.

R. brought an action against several mill owners on the Ottawa River for damage to his business as an owner and letter of boats, caused by sawdust and mill refuse being thrown into the river and accumulating so as to obstruct navigation, and he claimed that he was not only prevented from sailing his boats on the river, but his customers who hired boats left him on account of the sawdust and refuse accumulating in front of his boathouse. On the trial judgment was given for the defendants, but was reversed by the Court of Appeal and by the Privy Council, and a reference to a master was ordered to assess the damages. Before the master defendants claimed that other mill-owners, not proceeded against in the action, had contributed to the alleged nuisance, and that the report should show the amount of damage caused by each defendant, also the amount of damage to R. under each head of injury claimed. The defendants offered evidence to show that the loss of custom to R. in letting boats arose from the change in public taste, customers preferring the canal to the river; and plaintiff gave evidence in rebuttal, some of which defendants alleged to be irrelevant. The master having reported generally, awarding R. \$1,000 damages against each of the defendants, an appeal was taken against the report, resulting in its being affirmed by the Chancellor; and in the Court of Appeal two of the four judges were in favour of confirming the

report and the other two gave no judgment. On appeal by defendants to the Supreme Court, in addition to the objections to the report, it was argued that the Court of Appeal gave no judgment.

Held, that the master properly treated defendants as joint tortfeasors and was not obliged to give reasons for his report, provided he sufficiently followed the directions in the decree; and, that he was not obliged to sever the damages, either to show the liability of each defendant or the amount due plaintiff under each head of damage claimed.

Held, further, that the master was the final judge as to the credibility of the witnesses, and his report should not be sent back because some irrelevant evidence may have been admitted of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.

Held, also, that this Court should not go behind the formal judgment of the Court appealed from, which stated that the appeal was dismissed. Moreover the position was the same as if the judges of the Court of Appeal had been equally divided in opinion, in which case the appeal would have been properly dismissed.

Appeal dismissed with costs.

Gormully, Q. C., for appellants.

O'Gara, Q. C., for respondent.

COURT OF APPEAL ABSTRACT.

Vente conditionnelle—Reprise de possession à défaut de paiement—

Exercice abusif de ce pouvoir.

En janvier 1888, le demandeur a acheté de la défenderesse certaines machines pour un moulin à scies, pour la somme de \$1,690, payable \$400 comptant, et la balance par quatre billets à 6, 12, 18 et 24 mois, avec stipulation que la propriété resterait à la défenderesse jusqu'au parfait paiement, et qu'à défaut de paiement des termes à échéance, la totalité du prix deviendrait exigible, et la défenderesse pourrait reprendre possession des machines sans remboursement des paiements faits. En août 1889, la défenderesse, réclamant une balance de \$681, comme non payée, a enlevé les machines, qui étaient établies et enmurallées

dans le moulin du demandeur,—et de là action par ce dernier pour \$10,000 de dommages. La défenderesse n'a remis les billets qu'avec ses plaidoyers, et la preuve a démontré qu'il n'était dû par le demandeur, lors de l'enlèvement des machines, qu'une balance de \$2.88.

Jugé, que si la Cour est obligée de reconnaître des contrats de cette nature, qui sont peut-être, dans la rigueur, nécessaires avec notre mode de transiger les affaires, elle doit les limiter à leurs strictes dispositions; que dans les circonstances de la présente cause, la Cour ne pouvait faire autrement que de déclarer abusive la conduite de la défenderesse, et le jugement accordant \$1,760 de dommages, (au montant des argents payés en acompte par le demandeur, et les dommages à ses bâties), est confirmé avec dépens.—*Waterous Engine Works Co. et Collin*, Québec, Lacoste, C. J., Baby, Bossé, Blanchet, Hall, JJ., 6 mai 1892.

Vente par licitation—Annulation.

La vente par licitation d'un immeuble dont une partie a été distraite, au cours des procédures, par aliénation en faveur d'une compagnie de chemin de fer, sous l'Art. 5164, S. R. Q., est annulable à la demande de l'adjudicataire par voie d'action en nullité de décret.—*Picard & Picard et al.*, Québec, Lacoste, C. J., Baby, Blanchet, Hall, et Wurtele, JJ., 6 février 1892.

Cité de Québec—Règlement municipal.

Jugé :—Un règlement municipal qui frappe d'un droit de \$5 chaque cheval et chaque voiture, etc., est conforme au Statut qui autorise la Corporation à prélever ce droit "sur chaque cheval et chaque voiture, etc.," quoiqu'il ajoute "lesquels cheval et voiture seront exemptés de porter un numéro, et ne devront pas stationner aux portes et aux stations des cochers et charretiers," ces derniers mots étant ajoutés pour un objet spécial et n'ayant pas pour effet de borner le pouvoir de la Corporation à l'imposition d'un seul droit pour chaque cheval avec voiture.—*Cité de Québec et Godin*, Lacoste, J. C., Bossé, Blanchet, Wurtele, JJ., et Ouimet, J. A., 6 février 1892.

Statute—Construction of—54 Vict. (Q.) Ch. 96—“Is authorized to pay”—Preamble.

A testator directed that certain allowances should be paid monthly to his children. By a subsequent act of the Legislature (54 Vict., Q., Ch. 96), his testamentary executrix was “authorized to pay” to each of the children an additional sum of \$200 per month,—the preamble stating that the revenues of the estate were considerable, that it appeared from the provisions of the will that it was the desire of the testator that his children should continue to live, after his death, in the same condition as to fortune, as during his lifetime, and that the testamentary executrix, with a view to the settlement of her children, desired to secure to them, during her administration, a larger income out of the revenues of the estate. It appeared that the revenues of the estate were amply sufficient for the payment of the increased allowances.

Held, that the terms of the statute, “is authorized to pay,” were permissive and not imperative, and that the testamentary executrix might refuse to pay the additional allowance without being obliged to assign any reason for such refusal.—*Lapierre & Rodier*, Montreal, Boseé, Blanchet, Hall, Wurtele, JJ., Ouimot, J., *ad hoc*, February 24, 1892.

Chemin de fer—Traverse de ferme—Obligation d'en construire pour chaque subdivision de lot—Droits futurs—Appel.

Jugé :—Les dispositions de l'Acte des clauses consolidées des Chemins de fer, 14 et 15 V., c. 51, s'appliquent à la Compagnie du Grand Tronc, incorporée par 16 V., c. 37, et cette compagnie est par conséquent tenue à la construction d'une traverse de ferme pour chaque terre traversée par sa ligne, que ces terres soient des subdivisions, ou non, des terrains originairement expropriés.

Le Statut Provincial des Chemins de fer (S. R. Q. 5171) n'affecte pas la compagnie du Grand Tronc ni les autres chemins de fer qui sont sous le contrôle de l'autorité fédérale, lesquels restent soumis à la seule autorité du Parlement Fédéral.

Dans la présente cause un appel au Conseil Privé est accordé : des droits futurs se trouvant affectés, quoique le montant de l'action ne soit que de \$110.—*Cie. du Grand Tronc et Huard*, Québec, Sir A. Lacoste, J. C., Baby, Bossé, Hall, Wurtele, JJ., 21 juin 1892.

Corporation publique—Chemins à barrières—Saisie des péages.

Jugé :—Les syndics des chemins à barrières de la Rive Sud, près de la ville de Québec, ne sont pas les agents du Gouvernement mais forment une corporation, et les argents produits des péages perçus aux barrières sur les chemins sous leur contrôle ne forment pas partie du revenu provincial, ni des argents appartenant à la Province, et peuvent être saisis pour le paiement des dettes contractées par les Syndics pour les fins de leur incorporation.—*Les Syndics des Chemins à Barrières & Burroughs*, Québec, Sir A. Lacoste, J.C., Baby, Blanchet, Hall, Wurtele, JJ., 21 juin 1892.

*SUPERIOR COURT ABSTRACT.**Promissory note—Relation between parties to—Prescription.*

Held, that the relation between two persons, joint and several makers of a promissory note, one of whom signs after the other for his accommodation, is that of principal debtor and surety; and where the person signing for accommodation is obliged to pay the amount of the note at or after maturity, his claim against the principal debtor is not subject to the five years' prescription applicable to promissory notes and claims of a commercial nature, but only to the prescription of thirty years, applicable to the claim of a surety who has paid the debt, against the principal debtor.—*Cullen v. Bryson*, Montreal, in Review, Johnson, C. J., Loranger, Doherty, JJ., November 30, 1892.

Rivière flottable—Ecluse—Glissoire—Drave.

Jugé :—Le droit de draver le bois sur les rivières flottables à bûches perdues dans leurs grosses eaux, est reconnu par la loi, et celui qui y met obstacle, par la construction d'une chaussée sans glissoire, est responsable des dommages qui peuvent en résulter.—*Atkinson v. Couture*, Québec, en Révision, Casault, Routhier, Caron, JJ., 31 mai 1892.

Cession de biens—Curator's costs—Landlord's privilege.

The defendant, plaintiff's tenant, became insolvent and assigned to the opposant, who did not take possession. Later, the plaintiff seized and sold defendant's effects under a writ of attachment for rent, and on the proceeds the opposant sought to be paid his bill as curator, by privilege.

Held, that the opposant had no right to be collocated for any portion of his claim to the detriment of the plaintiff who, as landlord, had a lien upon the whole of the effects seized and sold.—*Mc William & Osler, & Matte*, oppt., Quebec, S. C., Andrews, J., March 10, 1892.

Municipality—Injunction by ratepayer—Amended declaration—Service.

Held:—1. A ratepayer of a municipality has no right of action to restrain works or cause the removal of obstructions on the public highway, without showing that the same have caused, are causing, or will cause him some special damage peculiar to himself, and different from the damage which they may cause to the public generally; and the Court is not required in such action, on the issue between the plaintiff and the party executing the works, to decide whether the resolution of council, under the authority of which the works are being performed, is radically null.

2. Where a municipality is *mise en cause* in a suit in which the plaintiff asks that a resolution of the council be set aside, grounds of nullity, which are invoked only in the declaration as amended, cannot be taken into consideration by the Court on the issue with the *mise en cause* unless the amended declaration has been served upon the *mise en cause*.—*Senécal v. Edison Electric Co.*, Montreal, S. C., Doherty, J., January 7, 1892.

Loi électorale—Dépenses personnelles d'un candidat.

Jugé:—Il existe en loi une action pour le recouvrement d'une dette encourue par un candidat pour ses dépenses personnelles.—*Bernard v. Vallée*, C. C., Montmagny, Pelletier, J., 21 déc. 1892.

Mariage—Epoux séparés de fait—Aliments.

Jugé:—La femme séparée de fait de son mari, a un recours contre lui pour aliments, lorsque les mauvais traitements de ce dernier sont la cause de la séparation.—*Samson v. Lemelin et al.*, Québec, C. S., Casault, J., 24 décembre 1892.

Charge publique—Usurpation—Acceptation—C. P. C., 1016—Requête libellée—Déposition.

Jugé:—Puisque le recours que donne l'article 1016 du C. P. C. n'existe que lorsqu'il y a *usurpation, détention ou exercice illégaux*

d'une charge, une déposition sous serment qui ne mentionne que son *acceptation* est insuffisante pour autoriser l'émanation du bref. *Prendre sans permission* une charge (version française) n'est pas seulement l'accepter, mais s'en saisir, les mots "*intrude into*" (version anglaise) ne voulant pas dire seulement *accepter* une charge, mais s'en mêler, s'y fourrer.

Dans l'espèce, cette objection n'ayant pas été prise *in limine litis*, et la preuve démontrant que l'acceptation mentionnée a réellement été une prise de possession, le jugement déposédant le défendeur de la charge de conseiller, pour manque de qualification, est confirmé avec dépens.—*McLaughlin v. Paul*, Québec, en Révision, Casault, Routhier, Caron, JJ., 29 février 1892.

Garantie contre les faits et promesses du vendeur seulement—Droit de commutation ouvert—Connaissance de la cause d'éviction—Dépôt d'un acte sous seing privé chez un notaire—Preuve—Art. 1510, C. C.

Jugé:—1. Que l'acquéreur d'un immeuble, sous la garantie contre les faits et promesses seulement du vendeur, ne peut réclamer de ce dernier le montant qu'il a payé pour acquitter un droit de commutation ouvert lors de la vente.

2. Que plusieurs mutations de l'immeuble en question ayant eu lieu avant le titre de cet acquéreur, et la commutation devenant exigible lors de la première mutation, l'acquéreur est présumé avoir connu cette cause d'éviction, et ne peut l'opposer à son vendeur qui ne l'a garanti que contre ses faits et promesses seulement.

3. Que le dépôt d'un acte sous seing privé chez un notaire, n'a pour but que de conserver cet écrit, et ne donne pas aux copies qu'en dresse le notaire le caractère et la force probante d'un acte authentique, mais que cet écrit doit être prouvé comme les autres écrits sous seing privé.—*Guérin v. Craig*, et *Craig*, opposant, Montréal, en Révision, Loranger, Tellier et Davidson, JJ., 31 mai 1892.

Contrainte par corps—Injure—Dénonciation calomnieuse.

Jugé:—Il n'y a pas lieu à la contrainte par corps en exécution d'un jugement accordant des dommages, pour une dénonciation calomnieuse.—*Riverin v. Lessard*, Montréal, C. S., Mathieu, J., 2 décembre 1892.

Mandamus.

Jugé :—Que, dans une requête pour *mandamus*, sous l'art. 1022, C. P. C., contre un magistrat qui refuse d'entendre une plainte, dans une affaire où il a juridiction, il n'est pas nécessaire d'alléguer que le requérant n'a pas autre remède.—*Hooper & Dugas*, Montréal, C. S., Mathieu, J., 21 octobre 1892.

Action en dommages—Contrainte par corps—Distraction de frais.

Jugé :—Que la partie qui a obtenu jugement, dans une action pour injures personnelles, pour des dépens qui ont été distraits à son avocat, ne peut procéder à la contrainte par corps, en son nom, pour le montant de ces dépens.

Qu'il n'est pas nécessaire, avant de demander la contrainte par corps, de discuter les immeubles de la partie condamnée.

Que, sous les articles 2272 et 2276, C. C., la femme peut être incarcérée, lorsqu'elle est sous le coup d'un jugement accordant des dommages-intérêts pour injures personnelles.

Que la contrainte par corps est à l'arbitrage du tribunal qui peut l'accorder pour un temps limité.—*Quenneville v. St-Aubin*, Montréal, C. S., Mathieu, J., 2 décembre 1892.

Loi seigneuriale—Droit de pêche.

Jugé :—1. Le droit de pêche sur les rives du St. Laurent bornant les seigneuries, n'en était pas un accessoire et n'appartenait pas au seigneur auquel il n'avait pas été spécialement accordé.

2. Ce droit, lorsqu'il avait été accordé au seigneur, n'était pas sous-inféodé sans concession expresse et spéciale; et le seigneur, auquel le donne son titre, peut empêcher le censitaire riverain, que n'en a pas, de tendre une pêche sur la grève du St. Laurent à laquelle sa terre aboutit.—*Fraser v. Fraser*, Québec, en Révision, Casault, Routhier, Andrews, JJ., 31 mai 1892.

Procédure—Saisie-arrêt avant jugement—Requête pour annuler la saisie—Inscription.

Jugé :—1. Que quand la procédure a été faite d'une manière négligente de part et d'autre, il convient de s'assurer si justice a été rendue aux parties, et non pas si l'on a suivi strictement les règles de la procédure.

2. Que lorsqu'une requête pour l'annulation d'un bref de saisie-

arrêt avant jugement a été, après sa présentation, continuée à un autre jour, il n'est pas nécessaire qu'il y ait inscription pour preuve et audition sur cette requête, mais que le jour fixé, le requérant doit être présent avec ses témoins, et que faute par lui de procéder sur sa requête le tribunal, sur inscription du demandeur, peut rendre jugement sur le mérite de l'action, sans avoir égard à la requête du défendeur.—*McHugh v. Walker*, Montréal, en Révision, Jetté, Davidson et Pagnuelo, J.J., 30 novembre 1892.

Requête pour annulation d'élection municipale—Objections préliminaires—Cautionnement—Amendement—Délais.

Jugé, qu'en matière de contestation d'élections municipales, la Cour est toujours disposée à permettre d'amender la procédure et même de compléter le cautionnement, pourvu que les amendements ne constituent pas une procédure nouvelle en dehors des délais de rigueur.

Que le cautionnement exigé en pareil cas doit se rattacher clairement à la procédure dont il est question.—*Desmarteau et al. v. Daignault*, Montréal, C. C., Pagnuelo, J., 16 avril 1892.

Procédure—Opposition—Effets exempts de saisie—Choix du saisi—Description des effets—Articles 556, 560, C. P. C.

Jugé, que lors de la saisie, l'huissier instrumentant doit offrir au saisi le choix des effets qui sont exempts de saisie.

Que l'huissier doit décrire les effets saisis de manière à les identifier; qu'ainsi, la désignation, au procès-verbal, de "quatre lits sur sept" est insuffisante.—*Lanthier v. Thouin, & Thouin*, Montréal, C. C., Pagnuelo, J., 1892.

Condictio indebiti—Lien de droit—Défense en droit—C. C. 1047.

La déclaration alléguait qu'en avril 1891, le gouvernement provincial, désirant payer certains subsides votés en faveur de la Compagnie de Chemin de fer de la Baie des Chaleurs, et voulant que ces subsides fussent d'abord employés à acquitter certaines dettes antérieures de cette compagnie, nomma un mandataire qu'il chargea de faire ces paiements, et qu'une lettre de crédit au montant de \$100,000, adressée à la Banque Union, fut mise à la disposition de ce mandataire pour cet objet. Que celui-ci la déposa à la dite Banque Union, et, le même jour, fit à l'ordre

du nommé C. N. Armstrong, cinq chèques de \$20,000 chacun, et les lui remit dans le bureau du défendeur, et qu'immédiatement les dits chèques furent endossés et délivrés par le dit Armstrong au défendeur, sans qu'il ne fut rien dû à ce dernier. Et le gouvernement demanda le recouvrement de cette somme du défendeur, par action en répétition de l'indû.

Jugé :—Sur défense en droit, que l'action ne démontrait aucun lien de droit entre le Gouvernement et le défendeur, et ne pouvait être maintenue.—*Casgrain, Proc.-Gén. v. Pacaud*, Québec, S. C., Routhier, J., 16 mai 1892.

Femme mariée—Obligation pour son mari—Billet—Tiers porteur de bonne foi—Preuve—Art. 1301, C. C.

La femme mariée, qui veut profiter de la disposition énoncée en l'article 1301, C. C., pour échapper au paiement d'un billet qu'elle prétend avoir signé pour son mari, doit prouver que le tiers porteur qui a escompté ce billet savait, au moment où il a avancé son argent sur la foi de la signature de la défenderesse, que cette dernière ne s'était obligée que pour son mari.—*La Banque Nationale v. Dame H. Ricard*, Montréal, S. C., Loranger, J., 11 avril 1892.

Telegraph Company—Power to cut overhanging boughs—Trespass.

Held :—The Montreal Telegraph Company has, by its charter, the right to cut the branches of trees overhanging highways, which interfere with the working of its telegraph lines; but such right does not justify a trespass on private property for the purpose of cutting such branches, and the Great North Western Telegraph Company, as lessees of the Montreal Telegraph Company's lines, has the same rights.—*Roy v. Great North Western Telegraph Co.*, Quebec, C. C., Casault, J., 1892.

APPEALS.—The Quebec Act, 56 Vict. ch. 42, passed last session, provides that an appeal from an interlocutory judgment must first be allowed by one of the judges of the Court of Queen's Bench, upon a summary petition.

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SUPREME COURT OF CANADA.

OTTAWA, Feb. 20, 1893.

Quebec.]

STEVENSON V. CANADIAN BANK OF COMMERCE.

*Insolvency—Knowledge of by creditor—Fraudulent preference—
Pledge—Warehouse receipt—Novation—Arts. 1034,
1035, 1036, 1169, C.C.*

W.E.E., connected with two business firms in Montreal, viz. the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and of Elliott, Finlayson & Co., wine merchants, made a judicial abandonnent, on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The Bank discounted for W. E. Elliott & Co., before his departure for England, on the 30th June, a note of \$5,087.50 due 1st October, signed by John Elliott & Co., and endorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On or about the 9th July 146 barrels were sold and the proceeds, viz. \$3,528.30, were subsequently, on the 9th August, credited to the note of \$5,087.50. On the 13th July, McDougall, Logie & Co. failed and W. E. E. was involved in the failure to the extent of \$17,000, and on the 16th July, Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of \$7,559.30 on the paper of McDougall, Logie & Co., customers' notes of the oil business to

the amount of \$2,768.28, upon which the bank collected \$1,603.43, and still kept a note of J. P. & Co. unpaid of \$1,165.32.

On the return of W. E. E. another note of John Elliott & Co. for \$1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms on their joint paper of \$2,660.53. The old note of \$5,087.50 due 1st October, and the one of \$1,101.33, were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co., and secured by 200 barrels of oil, viz., 146 barrels remaining from the original number pledged and an additional warehouse receipt of 54 barrels of oil, endorsed over by W. E. E. to Finlayson, Elliott & Co., and by them to the bank. The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August and the giving of the notes on the 16th July to the Bank were fraudulent preferences. The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 16th July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference. (*Vide* 1 B. R. Q. 371.)

On an appeal and cross appeal to the Supreme Court:

Held, 1st, that the finding of the Court below of the fact of the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Gwynne, J., dissenting.

2nd. That the additional security given to the Bank on the 10th August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co. was also a fraudulent preference. Gwynne, J., dissenting.

3rd. Reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s

substituted notes. Arts. 1169 and 1034 C. C.—Gwynne and Patterson, JJ., dissenting.

Appeal allowed and cross
appeal dismissed with costs.

Macmaster, Q.C., & Geoffrion, Q.C., for appellant.

Lash, Q.C., & Morris, Q.C., for respondent.

Quebec.]

VAUDREUIL ELECTION CASE. *McMILLAN V. VALOIS.*

Election petitions—Separate trials—R.S.C. ch. 9, secs. 30 & 50—Jurisdiction.

Two election petitions were filed against the appellant, one by A. C. filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April. The trial of the A. V. petition was by an order of a judge in Chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the judge in Chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial judges who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined, and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then, as no notice had been given that the A. C. petition had been fixed for trial, and subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election. On an appeal to the Supreme Court,

Held, 1st, that under sec. 30 of ch. 9 R. S. C. the trial judges had a perfect right to try the A. V. petition separately.

2nd, that the ruling of the Court below on the objection relied on in the present appeal, viz. that the trial judges could not proceed with the petition in his case because the two petitions filed had not been bracketed by the prothonotary as directed by sec. 30 of ch. 9 R. S. C., was not an appealable judgment or decision. R. S. C., ch. 9, s. 50. (Sedgewick, J., doubting.)

Appeal dismissed with costs.

Bisaillon, Q. C., for appellants.

F. X. Choquette, for respondent.

Ontario.]

CAMPBELL v. PATTERSON.

MADER v. MCKINNON.

Chattel mortgage—Preference—Boná fide advance—Consideration partly bad—Effect on whole instrument—R. S. O. (1887), c. 124, s. 2.

R., being in insolvent circumstances, applied to P. his uncle, for a loan of \$5,000 which he received, P. mortgaging his house for part of the amount and giving his note for the balance, which R. had discounted. The security for this loan was a chattel mortgage on R.'s stock of goods in his store. The money was applied by R. for the most part in taking up notes made by him and endorsed by his relatives. P. knew when he advanced the loan that R. was insolvent, but it was not shown that he knew how the money was to be applied.

R. gave another chattel mortgage to M. for another loan of money applied in the same way, but it was shown that part of the loan was his own money though alleged to have been advanced by his wife.

An action was brought on behalf of R.'s creditors to have these mortgages set aside as being void under R. S. O. (1887), c. 124, s. 2, and at the trial before the Chancellor both were set aside. The Court of Appeal reversed the decision setting aside the mortgage to P., and affirmed that setting aside the mortgage to M., holding as to the latter, following *Commercial Bank v. Wilson* (3 E. & A. Rep. 257), that the mortgage being void in part for illegal consideration the whole instrument was void.

Held, affirming the decision of the Court of Appeal in *Campbell v. Patterson* (18 Ont. App. R. 646, *sub nom. Campbell v. Roche*), that the mortgage to P. being given for an actual *boná fide* advance, the provisions of sec. 2 of the Ontario statute did not apply to it, especially as P. was not shown to have had knowledge of R.'s motive in procuring the loan.

Held, also, over-ruling the decision in *Mader v. McKinnon* (18 Ont. App. R. 648, *sub nom. McKinnon v. Roche*) in so far as *Commercial Bank v. Wilson* was followed, that that case was decided under the statute of Elizabeth, and is not now law under the Ontario statute, and a mortgage may be set aside as to part and maintained as to the remainder, but affirming the judgment of the Court of Appeal on the ground that the evidence showed the

whole of the consideration for M.'s mortgage to be illegal and bad.

Appeal dismissed with costs.

McCarthy, Q. C., and *McDonald, Q. C.*, for appellants and respondents respectively.

Moss, Q. C., and *Thomson, Q. C.*, for respondents and appellants respectively.

Exchequer.]

THE QUEEN v. CLARKE.

Appeal—Limitation of time—Final judgment.

On the trial in the Exchequer Court, in 1887, of an action against the Crown for breach of a contract to purchase paper from the suppliants, no defence was offered and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the Court, and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887.

Held, Gwynne and Patterson, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter, unless the time was extended as provided by the statute, and the extension of time granted by the Exchequer Court on its face only refers to an appeal from the judgment pronounced in 1891.

Held, per Gwynne and Patterson, JJ., that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings, and on appeal therefrom all matters in issue are necessarily open.

Appeal dismissed with costs.

Robinson, Q. C., and *Hogg, Q. C.*, for appellant.

McCarthy, Q. C., and *McDonald, Q. C.*, for respondents.

Ontario.]

HUSON v. SOUTH NORWICH.

Municipal Corporation—By-law—Submission to rate-payers—Compliance with statute—Imperative or directory provisions—Authority to quash.

The Ontario Municipal Act, R. S. O. (1887) c. 184, requires, by sec. 293, that before the final passing of a by-law requiring the assent of the rate-payers, a copy thereof shall be published in a public newspaper either within the municipality or in the County town, or published in an adjoining local municipality. A by-law of the township of South Norwich was published in the village of Norwich in the County of Oxford, which does not touch the boundaries of South Norwich, but is completely surrounded by North Norwich which does touch said boundaries.

Held, affirming the decision of the Court of Appeal (19 Ont. App. R. 343) that as the village of N. was geographically within the adjoining municipality, the statute was sufficiently complied with by the said publication.

This case raises also a question as to the constitutionality of what is known as the "local option Act" of Ontario, the argument on which was postponed until the validity of the by-law was settled, and will be proceeded with at the May Term.

Robinson, Q. C., and *Du Vernet* for the appellant.

Maclaren, Q. C., and *Titus* for the respondents.

Ontario.]

GRAND TRUNK RAILWAY CO. v. COUNTY OF HALTON.

Railway company—Bonus to—Bond—Condition—Breach.

The County of H. in 1874 gave to the H. & N. W. Ry. Co. a bonus of \$65,000 to be used in the construction of their railway, and the company executed a bond, one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." In 1888, the H. & N. W. Ry. Co. became merged in the G. T. R. company, and as was held on the facts proved by the trial judge and the Divisional Court, ceased to be an independent line.

Held, affirming the decision of the Court of Appeal (19 Ont. App. R. 252), that there had been a breach of the above condition, and the County was entitled to recover from the G. T. R. the whole amount of the bonus as unliquidated damages under said bond.

Appeal dismissed with costs.

S. H. Blake, Q. C., and *W. Cassels, Q. C.*, for the appellants.

Robinson, Q. C., and *Bain, Q. C.*, for the respondents.

COURT OF APPEAL ABSTRACT.

Insurance, Guarantee—Notice to insurer of defalcation—Diligence.

By a condition of a guarantee policy insuring the honesty of W., an employee, it was stipulated that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had been guilty of any criminal offence entailing, or likely to entail, loss on the employers, and for which a claim was liable to be made under the policy. On the 22nd June, the employers' auditors notified them that an unexplained deficiency, amounting to \$300 or \$400, existed in the accounts of W., who was their secretary-treasurer. Respondents did not notify the guarantors, but gave W. a week to explain or rectify the matter. On the 29th of the same month the auditors, about 4 p.m., notified the employers of their discovery that a cheque for \$14,000, received by W. on the 9th June, had not been entered in his cash book although it had been regularly credited to the employers' account at their bankers. The matter was discussed between the employers and auditors that evening, but notice of the discovery was not given to the guarantors until the following morning, when W. failed to appear at his place of business, and they did not authorize his arrest or detention until some hours afterwards, when it was too late to intercept him in his flight from the country.

Held, that the employers had not complied with the conditions of the contract as to immediate notice, and were not entitled to recover under the policy.—*Guarantee Co. of N. A. & Harbor Commissioners of Montreal*, Montreal, Lacoste, C. J., Baby, Blanchet, Hall and Wartele, JJ., (Hall, J., diss.) December 23, 1892.

Billet promissoire—Prête-nom—Compensation.

Jugé:—Lorsqu'un créancier poursuit son débiteur sur obli-

gation, et offre de lui remettre ses billets, donnés comme sûreté collatérale, le débiteur peut, dans ce cas, compenser cette créance, et aucun recours ne peut être exercé sur ces billets.—*Hould & Tousignant*, Quebec, Sir A. Lacoste, J.C., Baby, Bossé, Blanchet, Hall, JJ., 21 juin 1892.

Municipal matters—53 Vic. (Q.) ch. 71, s. 699—*Exemption from taxes as consideration for services to be rendered.*

Held:—1. That there is no appeal from a judgment rendered by a judge of the Superior Court in municipal matters, unless there is an evident excess of jurisdiction on the part of the council, or a serious violation of general or statutory provisions.

2. A section of a town charter which authorizes the council "to provide for the purchase of fire engines, or apparatus destined for the same purpose, and generally to adopt all measures best calculated to prevent accidents through fire," sufficiently covers the exemption from taxation of private water works, the exemption being granted in consideration of the proprietor furnishing an improved water service for the town.—*Molleur & Ville de St. Jean*, Montreal, Lacoste, C. J., Baby, Bossé, Blanchet, Hall, JJ., November 26, 1892.

Droit paroissial—*Election et résignation de marguilliers*—*Avis d'assemblées*—*Qualité d'ancien marguillier*—*Usage.*

Jugé:—1. Qu'il suffit qu'une assemblée de fabrique soit convoquée suivant l'usage de la paroisse (art. 3438 S.R.P.Q.)

2. Que lorsqu'il est d'usage d'envoyer un avis par écrit à chaque marguillier le convoquant à l'assemblée et d'annoncer cette assemblée au prône, l'irrégularité qui a pu se glisser dans l'annonce au prône et couverte par l'avis par écrit en bonne et due forme qui a été adressé à chaque marguillier.

3. Que l'usage de la paroisse de Notre Dame de Montréal n'étant d'indiquer le but de l'assemblée que dans deux cas, l'élection des marguilliers et le rendition des comptes, il n'était pas nécessaire de spécifier le but d'une assemblée convoquée pour accepter la résignation de marguilliers démissionnaires.

4. Que des requérants qui attaquent une élection de marguilliers parce qu'on leur aurait refusé de prendre part à cette élection, et qui n'alléguent pas que l'élection aurait produit une autre

résultat si on leur eût permis d'y participer, soulèvent une objection qui est sans intérêt dans la cause.

5. Semble à la majorité de la cour qu'un marguillier qui se démet de ses fonctions comme marguillier du banc n'a pas droit à la qualité, d'ancien marguillier.—*Auger & Labonté*, Montréal, Baby, Bossé, Blanchet, Hall et Doherty, JJ., 21 mai 1892.

*Substitution—Acceptation—Révocation avant l'acceptation—Fiducie
—Séparation de corps—Pension alimentaire—Réconciliation.*

L'appelant avait remis aux intimés comme fiduciaires, une somme de \$20,000, dont ils s'engagèrent à payer l'intérêt à sa femme à titre de pension alimentaire. Dans l'acte créant cette pension alimentaire se lisait la clause suivante :

"At the death of the said party of the second part (la femme de l'appelant), the capital sum of \$20,000 shall revert to and become the property of the said four children, or the survivors of them, share and share alike according to law, payable to them on their respectively attaining the age of majority, and should the said party of the second part die before the said children, or any of them, attain such age of majority, then and in that case, the revenues of the said capital sum of \$20,000, or the proportion thereof of such minors as have not attained the age of majority, shall be payable to the said party of the first part (l'appelant) until they shall have so attained said period of majority. But in case the said party of the second part survive the said party of the first part, it is agreed that the said payment of said trust shall cease, and that the said party of the second part shall be entitled to claim the sum stipulated in her contract of marriage, namely \$1,500 per annum, unless she prefer the present payments in lieu thereof, and that she shall not be entitled to both sums."

Jugé (infirmant le jugement de la Cour Supérieure): Que la clause en question ne constitue ni une donation ni une substitution en faveur des enfants, l'appelant ne s'étant pas désaisi de la dite somme du jour de la dite donation et les intimés n'en étant pas devenus propriétaires à la charge de la rendre, mais étant seulement chargés de l'administrer.

Qu'aucune des parties à l'acte n'ayant accepté cette disposition au nom des dits enfants, elle pouvait être valablement révoquée par l'appelant.

Qu'un acte par lequel un mari donne une pension alimentaire à

sa femme perd tous ses effets par suite de la reconciliation survenue subséquemment entre les époux.—*Smith & Davis*, Montréal, Lacoste, C J., Baby, Bossé, Blanchet, Hall, JJ., 26 janvier, 1893.

Distraction de dépens—Opposition—Intérêt de la partie quand les frais ont été distraits à son procureur.

Jugé, que la partie, étant responsable du paiement des dépens qui ont été distraits à son procureur, a un intérêt suffisant pour contester une opposition à la saisie faite à la poursuite de ce procureur sur distraction de frais.—*Fee & Peatman*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet et Wurtele, JJ., 28 février, 1893.

SUPERIOR COURT ABSTRACT.

Will—Legacy—Vagueness and uncertainty—Trust—Intervention—Procedure—C. C. P. 157, 158.

Held:—By the will in question in this cause a trust was created in favor of public Protestant charities and poor relations: and the terms creating such trust were not so vague and indefinite as to make it incapable of execution.

A party who has obtained leave to intervene in a suit, is justified, after the lapse of eight days from service of his petition, in considering his intervention as admitted (C. C. P. 158), and may thereafter produce his grounds of intervention, without demanding from the other parties a plea to his petition.

The premature production of such grounds would, in any case, constitute merely an irregularity, to be attacked by motion, and not by exception to the form.—*Ross v. Ross*, Quebec, S. C., Routhier, J., May 10, 1892.

Delegation of payment—Acceptance—Evidence.

Held, 1. An order in writing, addressed by a creditor to his debtor, directing him to pay a certain sum out of the moneys due to the drawer by the drawee, and to charge the same to the drawer, is not a bill of exchange, but an assignment to the payee of so much of the claim of the drawer against the drawee.

2. The acceptance and retention of such order by the drawee renders the delegation of payment perfect, without a written acceptance, and the subsequent insolvency of the drawer or assignor does not divest the payee of his right to such amount.

3. Verbal evidence is admissible to prove that the order was accepted.

4. Interest is due by the drawee on the amount of the order only from the time that he is put *en demeure* to pay the same.—*Ward v. Royal Canadian Ins. Co.*, Montreal, in Review, Johnson, C. J., Tait and Davidson, JJ., Dec. 30, 1892.

Avocats—Distraction de frais.

Jugé, que l'avocat, qui a obtenu distraction de frais, et qui a fait émaner, au nom de son client, un bref d'exécution pour le montant du jugement, en capital, intérêt et frais, peut, néanmoins, faire exécuter ensuite son jugement pour le montant des frais qui lui ont été accordés par distraction, en son nom propre, et que l'émanation du premier bref d'exécution au nom du client, ne peut être considérée comme une renonciation à la distraction.—*McNamara v. Gauthier*, Montréal, C. S., 10 octobre 1892.

Action paulienne—Droits immobiliers—Compétence—C. C. P. 1054—Fraude—Annulation de vente—C. C. 1032 et seq.—C. N. 1167.

Jugé : La Cour Supérieure (ou la Cour de Circuit, appellable) est seule compétente à connaître des causes relatives à des droits immobiliers, lors même que la demande est pour une somme moindre de \$100.

Par Casault, J. La révocation d'un contrat frauduleux est prononcée non seulement en faveur du créancier qui la demande, mais aussi en faveur de tous les créanciers auxquels le contrat attaqué porte préjudice. *Leduc & Tourigny et al.*, 17 R. J. Q. 385, discutée. Et, sous ce rapport, il n'y a aucune différence entre un paiement (C.C. 1036) et un contrat, tous deux faits par un débiteur insolvable et réputés faits avec intention de frauder.

Pour les actions pauliennes, comme pour toutes les autres actions révocatoires, la juridiction est déterminée par la valeur des choses qu'elles ont pour but de rétablir, les premières dans l'actif du cédant, les autres dans celui de la personne qui les intente.—*Beaulieu v. Levesque*, Québec, en Révision, Casault, Caron, Andrews, JJ., 31 décembre 1892.

Tuteur et pupille—Vente par un mineur, devenu majeur, à son tuteur—Compte de tutelle—Distribution de deniers—Art. 311, C. C.

Jugé:—Que lorsque les droits du mineur ont été clairement déterminés par l'inventaire de la succession échue à ce mineur, et que le compte de tutelle ne serait qu'une répétition de cet inventaire, les revenus des biens du pupille étant plus qu'absorbés par les frais de garde et de l'éducation du mineur, la Cour ne mettra pas de côté une vente consentie par le mineur, devenu majeur, à son tuteur, de ses droits successifs, pour la seule raison que cette vente n'a pas été précédée d'un compte de tutelle, surtout lorsque les parties ont réservé à l'inventaire comme constatant les droits de ce mineur.—*Lefebvre v. Goyette*, Montréal, en Révision, Taschereau, Tait et Pagnuelo, JJ., 30 novembre 1892.

Damages—Libel—Criticism of conduct of public man.

Held:—Though fair public criticism of a public servant is justifiable in the public interest, yet attacks on a public man based on unreliable rumors are pernicious and indefensible, and merit judicial reprobation.

In the present case, \$100 damages were allowed for the publication (without malice) of a newspaper article reflecting on the conduct of plaintiff as a public man, such article being based upon alleged rumors which the proof showed to be unreliable and unfounded, and the truth of which defendant took no means to test, though he might easily have done so.—*Pelletier v. Pacaud*, Quebec, S. C., Andrews, J., December 30, 1892.

Certiorari—Summary convictions Act—Vagrancy—Costs—Amended conviction—R. S. C., c. 157, s. 8.

Held:—The provisions of the Summary Convictions Act apply to section 8 of chapter 157 of the Revised Statutes of Canada, respecting vagrants.

A mere informality in the drawing up of a conviction is not a sufficient cause for quashing it, nor (there being no substantial defect in the justice and legality of the proceedings before the convicting justice) any reason for the removal of such conviction into the Superior Court by *certiorari*.

Any such informality may be amended and a substituted conviction returned by the convicting justice.—*Reg. ex rel. Denis v. Beaudry*, Quebec, S. C., Andrews, J., December 24, 1892.

Procédure—Pension alimentaire—Insaisissabilité—Créance alimentaire—Art. 558, C.P.C.

Jugé, qu'une pension alimentaire déclarée insaisissable peut néanmoins être saisie à la poursuite d'une personne, dans l'espèce l'épouse du défendeur, à qui le créancier de cette pension alimentaire doit lui-même des aliments.—*Bélair v. Sénécal, & Sénécal, T.S., Montréal, C.S., Jetté, J., 1er. septembre 1892.*

Arrestation mal-fondée—Erreur de nom—Publicité donnée à l'arrestation—Dommages—Responsabilité.

Un mandat d'arrestation ayant émané contre le frère du demandeur, deux officiers de police de la cité de Montréal, sans s'être procuré un signalement suffisant de l'accusé ni s'être renseigné sur ses prénoms et sa résidence, arrêterent le demandeur qui avait une certaine ressemblance avec son frère. Le demandeur passa la nuit dans les cellules d'une station de police et ne fut libéré que le lendemain.

Jugé: Que ce manque de précautions engageait la responsabilité des défendeurs, mais cette responsabilité ne s'étendait pas à la publicité donnée par les journaux à cette arrestation du demandeur, les défendeurs n'ayant aucunement participé à cette publicité.—*Bigras v. La Cité de Montréal, Montréal, C.S., Jetté, J., 1er. sept. 1892.*

Garantie de fournir et de faire valoir—Recours du cessionnaire—Insolvabilité du débiteur.

Jugé, que le cessionnaire d'une créance, qui lui est transportée avec garantie de fournir et de faire valoir, perd son recours contre le cédant, s'il retarde de plusieurs années à en poursuivre le recouvrement contre le débiteur, et si ce retard est cause de la perte de cette créance, à moins qu'il ne soit établi que ce dernier n'était plus solvable à l'époque du transport ou de l'exigibilité de la créance.—*Boisvert v. Augé, Montréal, en Révision, Sir F. G. Johnson, J.C., Mathieu et Loranger, JJ., 13 février, 1892.*

Sale—Contract in writing—Modification—Parol evidence.

Plaintiff, at Melbourne, sold to defendant lumber, intended for the New York market, which, by the terms of the contract in

writing, was "to be of good quality, and to be accepted at Belœil," thence to be forwarded to New York on defendant's own boat. At Belœil defendant pointed out to plaintiff, on the barge on which the lumber was laden, a quantity of culls which had been set apart on the deck, and objected to them. Plaintiff, according to his evidence, answered, "do the best you can with them," meaning, as he explained, that a small amount of lumber was nothing, in a quantity like the total amount sold; but he also asserted that he had refused to modify the contract, or to accept inspection of the lumber at New York. Defendant then paid \$775 on account, and carried the lumber, including the culls, to New York, where the whole was sold. Defendant claimed that the contract had been modified, so as to make the lumber subject to inspection at New York.

Held, that the evidence of plaintiff did not justify the admission of parol evidence to show that the original contract, by which the lumber was to be accepted at Belœil, had been abandoned, or varied, so as to entitle the defendant to treat the entire cargo as sold subject to inspection at New York.—*Cross et al. v. Bullis*, Montreal, in Review, Johnson, C.J., Tait and Davidson, JJ., December 30, 1892.

SUPERIOR COURT.

SHEEBROOKE, Jan. 31, 1893.

Coram BROOKS, J.

MOORE v. JOHNSTON et al.

Possessory action.

Held:—1. *That title can legally be pleaded to a possessory action in respect of lands held in free and common soccage in the Eastern Townships.*

2. *That a holder by sufferance is without quality to bring a possessory action.*

3. *That the proof in the present case establishes that the possession of the plaintiff was not ANIMO DOMINI, but rather a possession by tolerance and sufferance of the real owner.*

BROOKS, J.:—

This is a possessory action to recover possession of the north-west half of the south west half of lot 17 range 10, Windsor, coupled with a demand for \$2,000 damages.

The plaintiff alleges that he had been illegally dispossessed of the property of which he had been in possession *animo domini* for upwards of a year and a day.

He alleges that the defendants illegally conspired together to oust him from his property, and that he had been greatly damaged thereby.

The defendants, Johnston and Fraser, plead a denial of the allegations of the plaintiff, and especially that plaintiff was not in possession as owner, but as a tenant of the defendant, Louis Duchesneau.

They further plead title in the defendant Fraser of the property in question. This plea is demurred to by the plaintiff on the ground that adverse title cannot be pleaded as a defence to a possessory action.

This demurrer or answer-in-law, was heard, and *preuve avant faire droit* ordered.

The demurrer is unfounded and must be dismissed.

The principle seems to be well settled that adverse title can be pleaded in respect of lands held in free and common soccage in the Eastern Townships.

I find that this principle has been held in our courts in several cases, some of which are unreported.

In a case from Arthabaska of *Hamel v. Jacques*, this point was decided by Mr. Justice Polette, and his judgment was confirmed by Judges Meredith, Taschereau and Stuart, in Review.

I have seen the record in that case, and the factum of the plaintiff Hamel, and a copy of the judgment.

It was a possessory action in respect of land of which Hamel had been in possession under a location ticket from the Crown.

During his absence in the States, the defendant Jacques recovered judgment against him, and brought this land to Sheriff's sale, buying it himself at a nominal price. Hamel returned and resumed possession and was afterwards forcibly dispossessed by the defendant Jacques. Hamel then brought a possessory action against Jacques who pleaded the Sheriff's title. This plea was demurred to and the demurrer was over-ruled on the ground that the land was situate in the Eastern Townships, and held under the free and common soccage tenure, and that title could be pleaded in respect of such lands. This judgment was confirmed in Review as before stated.

A similar judgment was rendered by the Court of Review at Quebec (Judges Casault, Andrews & Caron) in a case No. 113

Vigneau v. Champoux, also from Arthabaska. I have also seen the record in that case and examined the pleadings, and it appears to be in point.

The case of *Fahey v. Watts*, 11 Q.L.R. 354, decided by Judges Stuart, Casault & Andrews is to the same effect.

Then there was a case No. 58, *Millette v. Desrochers et al.*, from Arthabaska, in which this same question was raised by a demurrer to a plea. The demurrer was over-ruled by judgment of the Superior Court, and leave to appeal therefrom to the Court of Queen's Bench, Appeal Side, was refused. The record in that case has also been placed before me.

These decisions appear to be based upon Arts. 948 and 1110 C.P.C., and upon the principle that to allow title to be pleaded may avoid a circuitry of actions.

I have less hesitation in holding this doctrine in the present case, from the fact, which to my mind is well established, that the possession of the plaintiff was not as owner but through tolerance, and that the defendant Fraser, was acting in good faith under the authority of a writ of possession granted him by the Court.

Plaintiff's possession was not *animo domini*, it was not such a possession as would entitle him to an *action possessoire*. Poth. Poss. 1-15-100-115., C.P.C. Art. 946. He produced no title whatever characterizing his possession, and it is proved that before Duchesneau bought this property on the 10th November, 1890, plaintiff occupied simply by the charity and tolerance of his brother W. H. Moore, who was the registered and actual owner, and who aided and assisted plaintiff by allowing him the use of the farm and by giving him money, seed grain and cattle, etc., with which to carry it on. It appears also that when this property was about being sold at public sale on the 10th November 1890, the plaintiff made some arrangement with defendant Duchesneau to buy in the property and allow plaintiff to remain on in possession.

I am satisfied from the evidence that after the 10th of November, 1890, the plaintiff occupied by the sufferance of the defendant Duchesneau who had the legal possession through the plaintiff his tenant. Poth. Poss. (Bugnet's Ed.) No. 15.

Action dismissed.

Brown & Morris for plaintiff.

Hurd & Fraser for defendants.

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SUPREME COURT OF CANADA.

Ottawa, Feb. 20, 1893.

Ontario.]

ATTY. GENERAL OF CANADA V. CITY OF TORONTO.

*Municipal corporation—Water rates—Discount by prompt payment
—Property exempt from municipal taxation—Discrimination
as to—R.S.O. (1887) c. 184, s. 480, s.-s. 3; c. 192, s.s. 19, 20.*

By R.S.O. (1887), c. 184, s. 480, s.-s. 3 (Municipal Institutions Act), it is the duty of a municipal corporation which has constructed water works, to supply water to all buildings on land along the line of any supply pipe, on request of the owner or occupant thereof. By c. 192, s. 19 (Municipal Water Works Act) the corporation has authority to regulate the distribution and use of water and fix the prices and time of payment therefor, and by s. 20 the corporation may pass by-laws, etc., for allowing a discount for pre-payment.

Pursuant to these powers, the corporation of the City of Toronto passed a by-law allowing a discount on all water rates paid in the first month of the quarter for which they should be due, but the same was not to apply to Government or other institutions which are exempt from city taxes. A tender was made to the City of the amount assessed on property of the Dominion Government, less the discount allowed by the by-law, which was refused, and the whole amount having been paid under protest an action was brought against the city for the rebate.

Held, reversing the decision of the Court of Appeal (18 Ont. App. R. 622), and that of Ferguson, J., at the trial (20 O. R. 9) Patterson, J., dissenting, that the legislature intended and enacted that the rate for water supplied by the City should be an equal rate charged upon all consumers alike, and the city corporation had no power to impose a greater rate for water supplied to a consumer who is not subject to civic taxation than is imposed upon consumers who are; therefore the by-law was *ultra vires* in so far as it makes a distinction between the two classes of consumers.

Per Patterson, J.—The imposition of water rates is not a tax, and there is no principle on which the city can be prevented from demanding a larger price for water supplied to consumers who have paid no part of the cost of constructing the works than it is willing to receive from those who have.

Appeal allowed with costs.

Reeve, Q.C. & Wickham, for appellant.

Robinson, Q.C., for respondent.

New Brunswick.]

CANADIAN PACIFIC RY. CO. V. FLEMING.

Appeal—Jurisdiction—Trial by jury—Withdrawal from jury—Disposal of questions of fact by Court—Consent of parties.

In an action against a railway company for damages for an injury caused by an engine of the company, the counsel for both parties agreed at the trial as follows:—"That the jury be discharged without giving a verdict, the whole case to be referred to the Court, which shall have power to draw inferences of fact, and if they shall be of opinion upon the law and the facts that the plaintiff is entitled to recover they shall assess the damages, and that judgment shall be entered as the verdict of the jury. If the Court should be of opinion that the plaintiff is not entitled to recover, a non-suit shall be entered." The jury were then discharged, and the Court in banc, in pursuance of such agreement, subsequently considered the case and assessed the damages at \$300, considering plaintiff entitled to recover. The company sought to appeal from such decision.

By the practice in the Supreme Court of New Brunswick all questions of fact are to be tried by a jury, and the Court can only deal with such questions by consent of parties.

Held, Gwynne and Patterson, JJ., dissenting, that as the Court took upon itself the decision of the questions of fact in this case without any legal or other authority therefor, than the consent and agreement of the parties, they acted as quasi-arbitrators, and the decision appealed from was that of a private tribunal constituted by the parties, which could not be reviewed in appeal or otherwise, as judgments pronounced in the regular course of the ordinary procedure of the Court may be reviewed and appealed from.

Held, also, that if the merits of the case were properly before the court the judgment appealed from should be affirmed.

Held, per Gwynne and Patterson, JJ., that the case was appealable; and on the merits, it appearing from the evidence that the servants of the company had done everything required by the statute to give notice of the approach of the train, the appeal should be allowed and a judgment of non-suit entered.

Appeal quashed with costs.

Weldon, Q.C., for appellants.

Skinner, Q.C., for respondent.

New Brunswick.]

PETERS v. CITY OF ST. JOHN.

Assessment and taxes—Insurance company—Net profits—Deposit with Government—Statement to assessors—Variance from form.

By sec. 126 of the St. John City Assessment Law, 1889, (52 V. c. 27) the agent or manager of any Life Insurance company doing business out of the Province is liable to be assessed upon the net profits made by him as such agent or manager from premiums received on all insurances effected by him; and the better to enable the assessors to rate such company, the agent or manager is required to furnish at a certain time in each year a statement under oath in a prescribed form, setting forth the gross income and particulars of the losses and deductions claimed therefrom, and showing the ratable net profits for the preceding year.

By the form prescribed, the deductions to be made from the gross income consist of re-insurance, rebate, etc., actually paid, and amounts paid on matured claims on policies issued by such agent or manager. In the form presented by the agent of a Life Insurance company in St. John, N. B., there was no amount

entered for deductions of the latter class, but instead thereof an item was inserted of "75 p.c. of premiums deposited with Government for protection of policy holders," which was an addition to the form. The statement showed that the deductions exceeded the gross income, leaving no net profits to be taxed. The assessors on receiving this statement disregarded the result shown thereby, and assessed the agent on net profits for the year of \$6,300. A rule *nisi* for a *certiorari* to quash the assessment was obtained, in support of which it was shown by affidavit that the amount required to be deposited with the Dominion Government by the company assessed was about 75 p.c. of the premiums received, and that the amount of such deposits from time to time returned to the company was applied for the benefit of policy holders and formed no part of the income or profits of the company. The Supreme Court of New Brunswick discharged the rule and refused to quash the assessment, on the ground that the Government deposit was a part of the income of the company held in reserve for certain purposes and formed no part of the expenditure, and that the agent had no right to strike out certain requirements of the form prescribed and substitute different statements of his own.

Held, reversing the decision of the Court below, Fournier and Taschereau, JJ., dissenting, that the agent was justified in departing from the form to show the real state of the business of the company, and the deposit was properly classed with the deductions; and the assessors had no right to disregard the statement and arbitrarily assess the company as they did.

Appeal allowed with costs.

Weldon, Q.C., & Bruce, Q.C., for appellant.

Jack, Q.C., for respondent.

New Brunswick.]

TIMMERMAN v. CITY OF ST. JOHN.

Assessment and taxes—Taxation of railway—Statutory form—Departure from—Powers of assessors—53 V., c. 27, s. 125 (N.B.)—

By the assessment law of the City of St. John (53 V., c. 27, s. 125 [N.B.]) the agent or manager of any joint stock company or corporation established abroad or out of the limits of the Province may be rated and assessed upon the gross and total income received for such company or corporation, deducting only there-

from reasonable cost of management, etc., and such agent or manager is required to furnish to the assessors each year a statement under oath in a prescribed form, showing the gross income and the deductions of the various classes allowed, the balance to be the income to be assessed; and in case of neglect to furnish such statement the assessors are to fix the amount of such income to be assessed according to their best judgment, and there shall be no appeal from such assessment.

The Atlantic division of the C.P.R. runs from Megantic in the Province of Quebec, through the State of Maine into New Brunswick. On entering New Brunswick it runs over a line leased from a N. B. Co. to the western side of the River St. John, and then over a bridge into the city, where it takes the I.C.R. Road. The general superintendent has an office in the city, but all monies received there are sent to the head office in Montreal.

The superintendent was furnished with a printed form to be filled up for the assessors as required by said act, which was as follows:—

“Gross and total income received for (Co.) during the fiscal year of — next preceding the 1st day of April. This amount has not been reduced or off-set by any losses” etc. This latter clause the superintendent struck out and filled in the first clause by stating that no income had been received by the company; the remainder of the form, consisting of details of the deductions, was not filled in. This was given to the assessors as the statement called for, and they disregarded it, assessing the company on an income of \$140,000, without making any inquiries of the superintendent as the act authorised them to do. A rule for a *certiorari* to quash this assessment was obtained, but discharged by the Court, on the ground that the superintendent had so far departed from the prescribed form that he had in effect failed to furnish a statement as required by the act, and the assessment against him was final.

Held, reversing the decision of the court below, Fournier and Taschereau, JJ., dissenting, that the superintendent had a right to modify the form proscribed to enable him to show the true facts as to the business of the company in St. John, and the assessors had no right to arbitrarily fix an amount assessable against him without taking any steps to inform themselves of the truth or falsity of the statement furnished.

Held, also, that the provision that there should be no appeal

from the assessment where no statement is furnished, relates only to an appeal against over-valuation under C.S. N.B. c. 100, s. 60, and does not abridge the power of the court to do justice if the assessors assess arbitrarily or upon a wrong principle, or no principle at all.

Held, per Gwynne and Patterson, JJ., that the assessment law of St. John does not apply to railway companies, there being no provision made for ascertaining the amount of business done in the city as proportioned to the whole business of the company.

Appeal allowed with costs.

Weldm, Q.C., for appellant.

Jack, Q.C., for respondents.

New Brunswick.]

ELLIS V. THE QUEEN.

Appeal—Contempt of court—Criminal proceeding—Sup. & Ex. Courts Act (R.S.C. c. 135), s. 68.

Contempt of court is a criminal matter, and an appeal to the Supreme Court from a judgment in proceedings therefor, cannot be brought unless it comes within sec. 68 of the Supreme and Exchequer Courts Act (R.S.C., c. 135). *O'Shea v. O'Shea* (15 P.D. 59) followed. *In re O'Brien* (16 Can. S.C.R. 197) referred to.

The Supreme Court of New Brunswick adjudged E. guilty of contempt, but deferred sentence.

Held, that this was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

Appeal quashed.

Weldon, Q.C., for appellant.

Currey, for respondent.

EXCHEQUER COURT OF CANADA.

OTTAWA, March 13, 1893.

Coram BURBIDGE, J.

THE QUEEN V. FARWELL.

Information of intrusion—Appropriate remedies to be prayed for therein—Injunction to re-convey—Practice—Subsequent action between same parties—Res judicata.

Where, in a former action by information of intrusion to recover possession of land, the title to such land was directly

in issue and determined, the judgment therein was held to be conclusive of the issue of title sought to be raised by the defendant in a subsequent action between the same parties.

2. An order directing the defendant to re-convey the land is not an appropriate part of the remedy to be given upon an information of intrusion.

Semble, that letters-patent for public lands situated within the railway belt in British Columbia should issue under the Great Seal of Canada, and not under the Great Seal of British Columbia.

Richards, Q.C., Pooley, Q.C., and Helmcken for Crown.

Bodwell (with whom was *Hunter*) for defendant.

January 23, 1893.

ARCHIBALD V. THE QUEEN.

Construction of public work—Interference with public rights—Damage to individual enjoyment thereof—Liability—50-51 Vic., c. 16, s. 16, (c), Construction of.

Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the Exchequer Court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown.

2. The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (c) of the 16th section of *The Exchequer Court Act*, (50-51 Vic., c. 16), which gives the Court jurisdiction in regard to claims arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting in the scope of his duties or employment.

R. G. Code for suppliant.

W. B. A. Ritchie for Crown.

March 20, 1893.

MAGEE et al. v. THE QUEEN.

Rideau Canal—7 Vict. (Prov. Can.) c. 11, 9 Vict. (Prov. Can.) c. 42 — Conditional gift — Expropriation — Acquiescence — Forfeiture for breach of condition subsequent—Remedy against the Crown for unauthorized use of land—Abandonment by Crown—Reverter—Solicitor and client—Privileged communication—Evidence.

The Act 9 Vic., c. 42, was passed with the object of removing doubts as to the application of section 29 of the Act 7 Vic. c. 11, to certain lands set out and expropriated from one *S.* at Bytown. By the first section of the first mentioned Act it was enacted that the proviso contained in the 29th section of the Ordinance Vesting Act should be construed to apply to all the lands at Bytown set out and taken from *S.* under the provisions of the *Rideau Canal Act*, except “(1) so much thereof as was actually occupied “as the site of the Rideau Canal, as originally excavated at the “Sapper’s Bridge, and of the basin and bywash, as they stood at “the passing of the Ordinance Vesting Act, and excepting also, “(2) a tract of two hundred feet in breadth on each side of the “said canal,—the portion of the said land so excepted having “been freely granted by the said Nicholas Sparks to the late “Colonel By, of the Royal Engineers, for the purposes of the “canal,—and excepting also, (3) a tract of sixty feet round the “said basin and bywash - - - - - which was then “freely granted by the said Nicholas Sparks to the Principal “Officers of Ordnance for the purposes of the said canal, provided that no buildings should be erected thereon.”

The site of the canal, and the two hundred feet which were included within the limits of the land so set out and ascertained, had been given by an instrument, dated 17th November, 1826, under the hand of *S.* and one *B.* who was acting for the Crown, by which it was agreed that such portion of the land so freely given as might not be required for His Majesty’s service, should be restored to *S.* when the canal was completed. The canal was completed in 1832. Subsequent to the passing of the Act 9 Vic., c. 42, all the lands of *S.* so set out and ascertained were given up to him, except the portions above described, and deeds in the terms of the Act were exchanged between *S.* and the Principal Officers of Ordnance, in regard to the land so given up and so retained respectively.

Held, 1. That apart from the question of acquiescence and delay on the part of *S.* and those claiming under him, the Act 9 Vict., c. 42, and the deeds of surrender so exchanged, were conclusive between the parties so far as the area and boundaries of the lands to be retained and restored respectively, are concerned.

2. That the lands so retained are held by the Crown for the purposes of the canal, and that as to the tract of sixty feet around the basin and bywash there is attached a condition that no buildings are to be erected thereon.

3. That the proviso, that no buildings are to be erected on the said tract of sixty feet does not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs; nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture.

4. The court has no power or authority to restrain the Crown from making any unauthorized use of the land, or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant.

Seemle, that the Crown cannot alien the land or any portion of it, and if it should do so the suppliants would have their action against the grantee. If the Crown should abandon the land or any portion of it the land or such part of it would revert to the suppliants, and they might enter and possess it.

Held, also, that where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties, he ceases, in respect to the execution of the instrument, to be clothed with the character of a solicitor or counsel, and is bound to disclose all that passed at the time, relating to such execution.

Robson v. Kemp, 5 Esp. 52, and *Crawcour v. Salter*, L.R. 18 Chan. 34, followed.

McCarthy, Q.C., and *Christie, Q.C.*, for suppliants.

Robinson, Q.C. and *Hogg, Q.C.*, for Crown.

March 13, 1893.

THE QUEEN v. DEMERS *et al.*

Federal and Provincial rights—Title to lands in railway-belt in British Columbia—Unsurveyed lands held under pre-emption record, at time of grant of railway lands coming into operation—British Columbia Land Acts of 1875 and 1879—Terms of Union, section 11—Construction.

Held (1) Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled, all lands held thereunder become the property of the Crown in right of the Province, and not in right of the Dominion.

2. Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of the 11th section of the *Terms of Union* between the Province of British Columbia and the Dominion of Canada.

See Statutes of Canada, 1872, p. XCVII.

Richards, Q.C. and *Helmcken* for Crown.

Attorney-General, B.C. and *A. G. Smith* for defendants.

COURT OF APPEAL ABSTRACT.

Corporation municipale—Confirmation de certificat pour vente de liqueurs enivrantes—Conseillers intéressés—Arts. 135, 136, code municipal.

La corporation de Lachine avait, par une seule résolution, voté la confirmation de neuf certificats pour vente des boissons enivrantes. Parmi les membres du conseil présents et qui ont voté, se trouvaient trois conseillers intéressés, et en retranchant les noms de ces trois conseillers, il n'y avait pas quorum des membres du conseil.

Jugé, que, à raison de l'intérêt de ces trois conseillers, la résolution accordant la confirmation des neuf certificats était illégale et qu'on ne pouvait scinder le vote et se demander si, quant au certificat de l'appelant, il y avait un nombre suffisant de voteurs

non intéressés à la confirmation de ce certificat.—*Ouellette et La corporation de Lachine*, Montréal, Lacoste, J. C., Baby, Bossé, Blanchet, Hall, JJ., 26 janvier 1893.

Locateur et locataire—Changements aux lieux loués.

Le bail en question contenait la clause suivante :

"Should the lessee desire any alterations to be made to the said premises, and should the lessor see fit to make the same, the said lessee binds and obliges himself to pay 10 per cent per annum upon the total cost thereof, quarterly with said rental."

Jugé :—Que sous cette clause, il était à la discrétion du locateur de faire ou de ne point faire les changements aux lieux loués demandés par son locataire, et que dans l'espèce, ce dernier ne pouvait le forcer d'établir une communication entre plusieurs magasins contigus que le locateur lui avait loués par ce bail.—*Scroggie et Watson et al.*, Lacoste, J. C., Baby, Bossé, Blanchet, Wurtele, JJ., Montréal, 28 février 1893.

*Injure dans un plaidoyer—Malice et absence de cause probable—
Avocats.*

Jugé, que l'accusation portée dans un plaidoyer malicieusement et sans cause probable, accusant les demandeurs, avocats et procureurs, d'avoir institué, sans leur autorisation, des procédures et d'avoir perdu, par leur incurie, leur inhabilité et leur ignorance de la loi, des causes que les défendeurs leur avaient confiées, constitue une injure et engage la responsabilité des défendeurs.

(Par la majorité de la cour, Lacoste, J. C., et Hall, J., diss.) Que la malice et l'absence de cause probable peuvent s'inférer du fait qu'un des défendeurs avait au nom de ses co-défendeurs suivi les procédures en question pas à pas et avait exprimé, par écrit, sa satisfaction du travail accompli par ses procureurs.—*Mitchell et al.* et *Trenholme et al.*, Montréal, Lacoste, J. C., Baby, Bossé, Blanchet et Hall, JJ., 28 février 1893.

SUPERIOR COURT ABSTRACT.

Saisine du légataire universel—Exception dilatoire pour arrêter l'action pendant les délais pour faire inventaire et délibérer—Continuation de l'action après qualité prise de légataire universel sous bénéfice d'inventaire—Frais de l'exception dilatoire.

*Jugé :—*1. Que, dès le lendemain de la mort du testateur, son créancier a le droit d'assigner le légataire universel, et telle assignation est valide à toutes fins quelconques.

2. Que le légataire universel a l'exception dilatoire pour arrêter l'action pendant les délais pour faire inventaire et délibérer.

3. Que, si le légataire universel ensuite accepte sous bénéfice d'inventaire, alors l'action se continuera contre lui en cette nouvelle qualité.

4. Que, les demandeurs n'ayant pas contesté l'exception dilatoire, les frais de cette exception seront mis à la charge de la succession, c'est-à-dire, dans le présent cas, à la charge de la défenderesse es-qualité de légataire universel sous bénéfice d'inventaire.—*Massé et al. v. Lainé, Fraserville, Cimon, J., 17 novembre 1892.*

Bois coupé illégalement sur le terrain d'autrui et converti en bois de construction—Saisie-revendication—Main d'œuvre plus considérable que la matière—Compensation—Arts. 434, 435, et 1190 C. C.

*Jugé :—*1. Que les défendeurs, qui ont coupé illégalement du bois sur la terre du demandeur et l'ont enlevé, ne peuvent, à la saisie-revendication que celui-ci en fait, lui opposer, en compensation, du bois qu'il avait coupé illégalement, quatre ans auparavant, sur la terre de l'un des défendeurs: *Spoleatus ante omnia restituendus.*

2. Que les défendeurs, en coupant ce bois et le convertissant en bois de construction, ont formé une chose d'une nouvelle espèce, dans le sens de l'art. 434 C. C.

3. Que, bien que la main d'œuvre surpasse de beaucoup la valeur de bois debout, le demandeur, maître du bois debout, reste propriétaire de la chose devenue d'une nouvelle espèce, tant qu'il n'aura pas été payé du prix du bois debout, et il a droit de saisir revendiquer la chose.

4. Que, bien que les défendeurs n'aient pas encore offert le prix du bois debout, la cour, en maintenant la saisie-revendication, leur

accordera l'option de pouvoir, sous un délai d'un mois, en payant le prix du bois debout, devenir propriétaire de la chose.—*Dubé v. Guéret et al.*, Fraserville, Cimon, J., 10 octobre 1892.

Servitude non déclarée ni apparente—Action en diminution du prix—
C. C. arts. 548, 1508, 1518, et 1519.

Jugé :—1. Que l'acheteur a, contre son vendeur, l'action en diminution du prix et en dommages, à cause d'une servitude non déclarée ni apparente au moment de son achat, et qu'il a trouvée consignée dans le titre de son vendeur sous forme de réserve en faveur d'un tiers, propriétaire de terrain voisin, même si celui-ci n'y était pas partie, et quand bien même la servitude n'est pas assez importante pour autoriser la rescision de la vente.

2. Que c'est au vendeur, si ce tiers n'y a pas droit, à faire disparaître la servitude, et non à l'acheteur à plaider à ce sujet avec ce tiers.

3. Que la clause d'un acte de vente, disant : " l'acquéreur déclare connaître le susdit emplacement et ses accessoires et n'en pas exiger plus ample désignation," est de pur style et ne porte que sur l'état apparent de l'emplacement à ce moment-là.

4. Un tuyau posé dans la terre pour conduire l'eau, lorsqu'il est recouvert de terre, et, surtout, le 9 avril, alors que la terre est recouverte de neige, étant non apparent, la servitude qui pourrait exister à son sujet est, aussi, à ce moment, non-apparente.

5. Qu'un puits sur un emplacement, s'il n'y a aucun signe apparent pour démontrer le contraire, est censé appartenir exclusivement au propriétaire de cet emplacement, et il ne montre pas être une servitude sur cet emplacement.

6. Quand bien même une servitude a été apparente antérieurement, si elle ne l'est pas au temps de la vente et n'a pas été déclarée à l'acheteur, celui-ci aura l'action en diminution du prix et en dommages.—*LeBel v. Bélanger*, Fraserville, Cimon, J., 10 octobre 1892.

Vente de graines—Garantie.

Jugé :—Que le marchand de graines de semence, qui vend à un jardinier des graines qu'on lui demande pour semer, est responsable de l'erreur, si ces graines ne sont pas de la qualité deman-

l'objection faite contre le droit d'un appelant d'inscrire en révision, l'objet de la révision étant seulement de déterminer le montant de l'indemnité à être payée.

Qu'aucune indemnité n'est due pour l'expropriation d'un chemin que le propriétaire a dédié au public.—*La cité de Montréal*, requérant expropriation de la rue Milton, et un propriétaire inconnu, et *Thompson et al.*, Montréal, en Révision, Johnson, J. C., Davidson et Pagnuelo, JJ., 30 novembre 1892.

Exception à la forme—Assignment d'un absent—Rapport de l'huissier
—Nullité—Art. 68, C. P. C.

Jugé :—Qu'un rapport d'assignation qui constate l'absence du défendeur est irrégulier lorsque l'huissier certifie qu'il a fait la signification au greffe, tandis qu'il aurait dû se borner à dire qu'il avait déposé au greffe la copie d'action.

Que cependant cette irrégularité est suffisamment couverte par l'ordonnance du tribunal permettant l'assignation régulière du défendeur par la voie des journaux.—*Carbonneau v. Vallée et al.*, et *Prévost et al.*, T. S., Montréal, C. S., Taschereau, J., 12 avril 1892.

Evidence—Commercial case—54 Vic. (Q.) ch. 45—Interrupted employment—Resumption of—Salary—Presumption.

Held :—1. A party to a suit cannot be heard as a witness on his own behalf, in a commercial case, to prove a contract alleged to have been made at a date prior to the coming into force of the Act 54 Vic. (Q.) ch. 45.

2. Where an employee quits his employment, and after an illness of several months resumes his former employment, it will be presumed, in the absence of evidence of a new agreement, that he returned at the salary he was getting at the time he left.—*Platt v. Drysdale*, Montreal, S. C., Doherty, J., January 25, 1892.

Promissory note—Parties to—Dilatory exception—Action en garantie—Art. 1953, C. C.

Held :—The maker of a promissory note cannot by dilatory exception stay the suit of the holder in order to call in the endorser *en garantie*.—*Molsons Bank v. Charlebois*, Montreal, S. C., Davidson, J., February 23, 1892.

Election expenses—Action for.

Held.:—The legitimate expenses of a candidate, incurred in connection with an election, are recoverable at law, unless it appear that the expenses were incurred with a corrupt or illegal motive.—*Taylor et al. v. Guerin*, Montreal, S. C., Taschereau, J., March 3, 1892.

Promissory note—Prescription—Insolvency of maker—Arts. 1092, 2260, § 4, C. C.

Held.:—A promissory note is not prescribed by the lapse of five years from the date of the maker's insolvency when he becomes insolvent before the date of maturity. Art. 1092, C. C., which says that the debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, was enacted in favor of the creditor, and does not create a new date, antecedent to maturity, from which prescription would begin to run in cases of insolvency.—*Whitley v. Pinkerton*, Montreal, S. C., Davidson, J., March 23, 1892.

Révocation de jugement—Prescription—Désaveu de procureur ad litem.

Jugé.:—Que le représentant de la partie qui attaque un jugement parceque l'instance aurait été reprise, continuée, instruite et jugé sous le nom, mais hors de la connaissance de cette partie et sans son consentement, ne peut réussir dans sa demande si les procureurs *ad litem* qui ont occupé dans cette reprise d'instance n'ont pas été désavoués par la partie ou pour elle.

Que l'action en révocation d'un jugement pour défaut d'autorisation de procédures se prescrit par trente ans, et que le point de départ de cette prescription est la date de ces procédures et non la date du jugement attaqué.—*Dorion v. Dorion*, Montréal, C. S., Tellier, J., 31 mars 1892.

Annulation d'un acte pour défaut de consentement—Bénéfice accru au demandeur—Réponse en droit.

Jugé, que l'allégation que le demandeur en nullité a bénéficié de l'acte dont il demande l'annulation pour défaut de consentement de sa part, n'est pas une réponse suffisante, et que cette allégation

sera renvoyée sur réponse en droit.—*Hudon v. Provost*, Montréal, C. S., Ouimet, J., 19 mars 1892.

Corporation municipale—Négligence—Responsabilité.

Jugé, qu'une corporation municipale est responsable du fait que les planches d'un de ses trottoirs ne sont pas convenablement clouées, et qu'il ne suffit pas à cette corporation de faire examiner de temps à autre les trottoirs sous son contrôle par ses employés, mais elle est responsable de la négligence de ces employés si ces derniers ne tiennent pas les trottoirs en bon ordre, de manière à offrir toute sécurité possible aux passants.—*Mills v. Corporation of the Town of Côte St. Antoine*, Montréal, C. S., de Lorimier, J., 29 février 1892.

Locateur et locataire—Capias—Recel.

Jugé, que le fait d'un locataire d'enlever la nuit les effets qui garnissent les lieux loués constitue un acte de recel donnant lieu au *capias*, et que le locateur n'est pas tenu de faire la recherche des effets recelés pour en opérer la saisie-gagerie par droit de suite, mais qu'il est fondé à exercer son recours par voie de *capias* du moment que le locataire ne lui divulgue pas l'endroit où se trouvent les dits meubles.—*Mitcheson v. Burnett*, Montréal, C. S., Jetté, J., 29 février 1892.

Responsabilité—Négligence.

Jugé, qu'un forgeron, qui, après avoir ferré un cheval, l'envoie mener chez son propriétaire sous les soins d'un jeune garçon et sans bride, ni mors, est responsable d'un accident arrivé à ce cheval par la négligence de son conducteur, et aussi du fait qu'il aurait, sans consulter le propriétaire du cheval, fait soigner ce cheval par une personne ignorante dont le traitement a rendu le cheval impropre à tout travail.—*McGuire v. Grant*, Montréal, C. S., Jetté, J., 16 mars 1892.

Evidence—Admission of party—Divisibility—Art. 231, §3, C.C.P.

In an action for the price of transfer of a tavern license, the defendant, being called as a witness, admitted that he had not

paid plaintiff the price stipulated, but he added that one C. was to do so. In the deed of transfer the plaintiff acknowledged receipt of the consideration.

Held, 1. That the accessory statement, in the defendant's answer, having relation to a fact wholly distinct from the principal fact mentioned in the first part of the answer, the answer was divisible.

2. (Johnson, C.J., *diss.*) The defendant having admitted in his evidence that he had not paid the plaintiff, it was for the defendant to show that some one else had, and he was not relieved from making this proof by the plaintiff's declaration, contained in the deed of transfer, that he had received payment.—*St. Amour v. St. Amour*, Montreal, in review, Johnson, C.J., Tait and Davidson, JJ., December 30, 1892.

Alimentary allowance—Art. 169, C. C.

Held:—In a petition claiming an alimentary allowance, from children and grandchildren, where it is neither alleged in the petition nor established by the affidavits produced in support of it, that the defendants are in a position to pay the alimentary allowance claimed or any part thereof, such petition will be rejected *sauf recours*.—*Levesque v. Plourde et al.*, Montreal, S. C., Tait, J., March 21, 1892.

Adopted child—Removal of parents—Claim for maintenance.

Held:—Where a person undertakes the support and maintenance of a child of unknown parents, with the object of bringing it up as his own child, and this purpose is frustrated by the parents, who subsequently appear and claim the child, he is entitled to recover from them a reasonable allowance for the maintenance of the child during the time it was under his care.—*Gingue v. Giroux*, Montreal, S. C., Lynch, J., March 3, 1892.

Requête civile—Désistement—Costs.

Held:—A party who, through a misunderstanding between attorneys, has obtained a judgment in the absence of his opponent, but who has voluntarily desisted therefrom, is not obliged to desist with costs; and if the opposite party refuses to accept a *désistement* without costs, and proceeds by *requête civile*, seeking

the revocation of the judgment on grounds of artifice and irregularity, his *requête* may be dismissed with costs, if it be not shown that the judgment was in fact obtained by artifice or irregularity.—*Leet v. Crothers*, Montreal, S. C., Doherty, J., March 10, 1892

Procedure—Summary matters—Art. 899a, C. C. P.

Held, Where the words "summary matters" are not marked upon the writ issued in a cause, the action must be held to have been instituted as a non-summary action, and, as such, is subject to the ordinary delays between service and return of the writ.—*Mousseau v. Raeburn*, S. C., Montreal, Doherty, J., March 8, 1892.

Rescision—Transaction—Erreur de droit—Lésion—Crainte d'un procès—Arts. 1012, 1921, C. C.

Le demandeur avait acheté de bonne foi d'un tiers, du fer appartenant à la défenderesse, qu'il avait ensuite brisé pour le vendre comme du vieux fer. Menacé de poursuites criminelles, il s'était obligé à payer à la défenderesse, \$1,400, ce qui dépassait considérablement le montant des dommages soufferts par cette dernière.

Jugé :—Que cet arrangement constituant une transaction, il ne pouvait être mis de côté à cause de l'erreur du droit sous l'empire duquel le demandeur s'était engagé à payer cette somme pour éviter des poursuites qui auraient été renvoyées par suite de sa bonne foi, et ce malgré la lésion que le demandeur avait éprouvée, la lésion n'étant plus une cause de nullité entre majeurs.

2. Que la crainte d'un procès suffit en droit pour constituer une transaction et lui servir de cause valable et licite.—*Ste. Marie v. Smart et vir de Lorimier*, m.-e.-c., C. S., Montréal, Jetté, J., 2 avril 1892.

Procédure—Révision de la taxation d'un mémoire de frais—Défaut de produire des pièces.

Le 6 juin les mis-en-cause avaient fourni copies d'un plaidoyer et d'articulations de faits aux avocats du demandeur, mais ce plaidoyer et ces articulations de faits n'étaient pas produits lorsque, le 30 juin, le demandeur s'est désisté de sa demande contre les mis-en-cause.

Jugé :—Que les procureurs des mis-en-cause n'avaient droit qu'aux honoraires d'une action discontinuée après comparution.—*Lancaster v. Doran et al.*, et *Charlebois et al.*, C. S., Montréal, Pagnuelo, J., 20 février 1892.

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CURRENT TOPICS AND CASES.

Those who remember the prodigality with which appointments of Queen's Counsel were made, in this province as well as elsewhere, only a few years ago, will feel rather surprised to learn that even a diligent investigation of the registers could disclose the names of forty-one other members of the bar, in the province of Quebec alone, upon whom the distinction had not been already conferred. Yet the *Canada Gazette* has been publishing weekly a fresh list of names which already number forty-one, and no man can predict what the total may be. We have so often referred to the subject of Queen's Counsel appointments (see particularly vol. 13, p. 25), that we presume our readers are nearly as tired of it as we are. The supposed honor having ceased to have any significance or use (unless it be regarded as an indirect tax upon the profession), common sense seems to suggest that it should be abolished.

The *London Law Journal* notes an interesting case relating to the liability of inquiry offices towards those concerning whom they give information. A Mr. Whitechurch, an English merchant in Paris, applied to a well-known agency there, Messrs. Wys Muller, to ascertain the commercial standing of Messrs. Weissmann & Kahn. The reply of the agency was favourable, but a few days

later the agency informed Mr. Whitechurch that they had learnt that Messrs. Weissmann & Kahn had become insolvent. They did not state this as a rumor, but as a fact. Mr. Whitechurch informed Messrs. Weissmann & Kahn of the information given him and its source, whereupon the injured firm took proceedings against Messrs. Wys Muller for defamation. The Tribunal of Commerce found against the plaintiffs, but the Court of Appeal declared itself satisfied that the statement was untrue, and that Messrs. Wys Muller had, therefore, incurred liability towards the appellants. The ground given by the decision is important. It is not material, it states, that the information was given "confidentially and without guarantee;" this does not annul the fault and its consequences. Even a rectifying note sent later on only diminished, but did not extinguish, the damage done, which was assessed at 2,000 francs. Messrs. Wys Muller hereupon sued Mr. Whitechurch for divulging the information, in spite of his engagement to treat it as confidential and himself as responsible for the consequences if he should divulge it. The Tribunal of Commerce condemned him to pay 500 francs damages for violation of his engagement, and this the Court of Appeal confirmed. It will be observed that, in spite of Whitechurch's undertaking to guarantee the agency against the consequences of divulging the information given, he only pays 500 francs of the 2,000 francs for which the agency is condemned.

COURT OF APPEAL ABSTRACT.

Partnership—Participation in profits—Liability to third parties.

Held :—That participation in the profits of a business does not make the person participating liable as a partner towards third parties unless he has been held out to the public as a partner.

M. entered into an agreement with N., who was then doing business alone under the style of B. L. Nowell & Co., by which M. advanced N. the sum of \$2,000, for which he was to receive 8 per cent interest and one half the net profits of the business.

M. also entered N.'s employment as manager, at a salary of \$1,200 a year. The agreement was for a year, at the end of which time N. agreed to take M. into the business as a partner, if M. so desired. After about 15 months N. made an assignment, and M. was sued for a debt of B. L. Nowell & Co., on the ground that by virtue of the above agreement he was a partner. *Held*, that M., not having been held out to the public as a partner, was not liable as such to third parties.—*Reid & McFarlane*, Montreal, Lacoste, C. J., Baby, Blanchet, Hall, Wurtele, JJ., (Baby, J., diss.) January 26, 1893.

Attorney and client—Right to remuneration in excess of official tariff.

Held:—An advocate has the right, in the absence of any agreement, to recover judgment against his client, for the proved value of his professional services, irrespective of the tariff. In the absence of a special agreement between advocate and client there is a presumption that the tariff shall govern as to the advocate's remuneration, but this presumption may be rebutted by evidence as to the unusual or unexpected importance or duration of the litigation.—*Christin et al. & Lacoste et al.*, Montreal, Baby, Bossé, Blanchet and Hall, JJ., January 26, 1893.

Vente pour taxes municipales super non domino—Nullité—Prescription—Arts. 1487 C. C., 632 C. P. C., 1015 C. M.

Jugé, que la vente pour taxes municipales d'un immeuble qui, avant la saisie et la vente, était devenu la propriété d'un tiers, est nulle, et que le tiers peut invoquer cette nullité même après l'expiration des deux ans que l'article 1015 du code municipal accorde pour demander l'annulation de semblables ventes.—*Lovell & Leavitt*, Montréal, Lacoste, J. C., Baby, Bossé, Blanchet, et Wurtele, JJ., 25 mars 1893.

Procédure—Cassation d'un règlement municipal—Droit d'appeler—Articles 1033, 1053, 1054 et 1142 C.P.C. et 100, 698 et 1077 C.M.

Jugé, qu'il y a pas d'appel du jugement de la cour de circuit cassant un règlement municipal.—*Corporation de la paroisse de St. George de Henryville & Lafond*, Montréal, Baby, Bossé, Blanchet, Hall, Wurtele, JJ., 26 janvier 1893.

Jury trial—Misdirection—Art. 414, C.C.P.—Verdict against evidence—New trial.

Held: 1. A verdict will not be set aside for misdirection by the court as to a point not material to the issue, and where it appears that justice upon the whole case was done and the proper question left to the jury.

2. Where the jury have properly and sufficiently answered one of the questions submitted to them, it is a sufficient compliance with Art. 414, C.C.P., if they refer, in their answer to a subsequent question, to their former answer as containing a sufficient reply to the question.

3. A new trial will not be granted on the ground that the verdict is against evidence, even where the court would have come to a different conclusion from that reached by the jury; but there must be such a preponderance of evidence as to make it unreasonable for the jury to find the verdict complained of.—*Royal Canadian Insurance Co. & Roberge*, Montreal, Baby, Bossé, Blanchet and Hall, JJ., December 23, 1892.

Summary Matters—Curator—Exception to the Form—Attorney's Signature—Arts. 56, 887, C. C. P.

Held, 1. The curator has the same right as the party he represents to proceed summarily in the cases mentioned in article 887, C. C. P., as amended by R. S. Q. 5977, 53 Vic. c. 61, s. 1, and 54 Vic. c. 41, s. 4

2. An exception to the form will not be maintained on the ground that the signature of the attorney certifying the copy of declaration was not written by the attorney himself, if it be proved that the signature is in the handwriting of a person duly authorized to sign for the attorney, the defendant in such case having no grievance.—*Prince & Stevenson*, Lacoste, C. J., Bossé, Blanchet, Hall & Wurtele, JJ., Montreal, Feb. 28, 1893.

Exécuteur testamentaire—Saisine—Inventaire—Interprétation—Arts. 917, 918 et 919, C. C.

Jugé, L'exécuteur testamentaire est saisi des biens meubles du testateur au moment du décès de ce dernier, indépendamment de la confection de l'inventaire.

L'art. 919 C. C., ne fait qu'énoncer les devoirs de l'exécuteur testamentaire, à défaut de l'accomplissement desquels, l'héritier,

ou le légataire universel peut demander sa destitution.—*Cook et al., & La Banque de Québec, C. R., Québec, Lacoste, J. C., Bossé, Blanchet, Hall et Wurtele, J.J., 10 janvier, 1892.*

SUPERIOR COURT ABSTRACT.

Mari et femme—Pension alimentaire—Séparation de corps—Enfants mineurs.

Jugé :—1. Que lorsque l'épouse est forcée par les mauvais traitements de son mari de vivre séparée de lui, elle peut porter contre lui une action pour pension alimentaire, tant pour elle-même, que pour les enfants qui sont à sa charge, sans avoir recours à l'action en séparation de corps.

2. Qu'elle peut prendre cette action sans avoir été nommée tutrice de ses enfants mineurs.—*Beaudry v. Starnes, C.S., Montréal, Taschereau, J., 25 novembre 1892.*

Propriété littéraire et artistique—Action pour amende—Défense en droit.

Jugé, que pour pouvoir réclamer la pénalité édictée par la 32e section du ch. 62, S. R. C., concernant la propriété littéraire et artistique, il faut alléguer la possession par le défendeur du nombre d'exemplaires qui forme la base de l'action.—*Ashdown v. Lavigne et al., C. S., Montréal, Pagnuelo, J., 20 février 1892.*

Execution—Guardian—Rule against—Option—Art. 597, C. C. P.

Held :—A rule against a guardian to effects seized under execution, which gives him the option of producing the goods seized, or of paying the value thereof, without stating what the value amounts to, and asks that he be imprisoned until he shall have paid an unascertained value of goods or amount of money, is illegal, and will be set aside.—*Evans v. Wiggins, and Wiggins, guardian, mis-en-cause, S. C., Montreal, de Lorimier, J., May 31, 1892.*

Cession et transport—Saisie-arrêt—Connaissance du cessionnaire de la saisie arrêt—Signification du transport—Arts. 2085, 2127 C. C., et 625 C. P. C.

Jugé : 1. Que le transport judiciaire d'une créance portant hypothèque qui résulte d'une saisie-arrêt, doit être enregistré, et s'il

ne l'a pas été, ce transport est sans effet à l'encontre d'un cessionnaire subséquent qui s'est conformé aux exigences de la loi.

2. Que la connaissance que le cessionnaire a pu acquérir de cette saisie-arrêt non enregistrée, ne préjudicie pas aux droits qu'il a acquis par le transport régulier et enregistré de la même créance, qui lui a été fait pour valeur.

3. Que la signification par extrait d'un acte de transport est suffisant si l'extrait récite toute la clause de l'acte de transport qui se rapporte à la créance en question.—*Lalonde v. Garand*, C. S., Montréal, Pagnuelo, J., 28 juin 1892.

Procédure—Péremption d'instance—Actes interruptoires—Pièces produites après les délais—Arts. 207 et 458 C. P. C.

Jugé: 1. Que le jugement de congé dénué que le demandeur a obtenu contre une première motion pour péremption d'instance ne constitue pas une procédure utile dans la cause qui puisse être opposée à une seconde motion pour péremption, la demande en péremption formant une instance distincte de l'instance principale.

2. Que des articulations de faits produites après enquête close, et par conséquent en dehors des délais de l'article 207 C. P. C., sans la permission de la cour ou le consentement de la partie adverse, et un avis d'enquête produit après la première motion pour péremption, mais qui avait été signifié avant la période de trois ans constituant cette péremption, ne sont pas des procédures utiles pouvant couvrir la péremption.—*Roy v. Cantin et al.*, C. S., Montréal, Taschereau, J., 11 avril 1892. (Confirmé en révision le 29 avril 1893.)

Trees on neighbour's land—Art. 529, C. C.

Held: A proprietor is not entitled, without obtaining authority to do so, to cut down trees and shrubs growing on his neighbour's land, on the line dividing their respective properties, on the ground that the trees and shrubs in question interfere with the cleaning of the boundary ditch, more especially where the weight of evidence shows that the ditch could have been cleaned without cutting the trees and shrubs.—*Bain v. Monteith*, S. C., Montreal, Gill, J., February 5, 1892.

*Procédure—Folle enchère—Description défectueuse—Adjudicataire—
Art. 717, C.P.C.*

Jugé, que la demande dirigée contre un adjudicataire pour folle enchère sera renvoyée, si l'adjudicataire fait voir que le lot qui lui a été adjugé était décrit aux avis de vente comme étant un lot bâti, tandis qu'au contraire ce lot était vacant.—*Cité de Montréal v. Perodeau, C.S., Montréal, Loranger, J., 28 janvier 1892.*

Corporation municipale—Exécution de règlements—Mandamus.

Jugé : 1. Que le pouvoir accordé à une corporation municipale de faire des règlements pour une certaine fin, est une attribution législative, entièrement discrétionnaire, et qui n'impose aucune responsabilité civile si elle n'est pas exercée; que le fait d'avoir passé les règlements invoqués ne change pas la position d'une corporation municipale envers ses administrés, et ne la laisse pas moins libre soit d'en exiger l'exécution, soit d'en tolérer l'inobservance, soit même d'en décréter le rappel pur et simple, si elle le juge à propos.

2. Que toute personne intéressée pouvant elle-même poursuivre les infractions aux règlements municipaux, on ne peut par *mandamus* forcer la corporation elle-même à le faire, le recours par *mandamus* n'étant pas permis lorsque la loi autorise un autre recours efficace et régulier.—*Roy v. La Cité de Montréal, C.S., Montréal, Taschereau, J., 3 mai 1892.*

*Procédure—Loi des licences—Compétence—Cour de Circuit—
Art. 1031 S.R.P.Q.*

Jugé, que la cour de circuit a seule juridiction pour connaître des actions en recouvrement d'amendes encourues pour infractions aux dispositions de la loi des licences, lorsque le montant de la demande n'excède pas \$200.—*Lambe v. Beauchamp, C.S., Montréal, Loranger, J., 16 février 1892.*

Procédure—Honoraires d'experts—Articles 344, 345 C.P.C.

Jugé : 1. Que des experts nommés en justice ne sont pas obligés d'attendre l'issue du procès pour le paiement de leurs frais et honoraires; mais qu'ils peuvent, dès que le montant en a été contradictoirement établi, le recouvrer des parties, lorsque aucun dépôt n'a été fait en cour.

2. Qu'une partie ne peut se soustraire à ce paiement qu'en démontrant que le rapport des experts est nul et sans utilité dans la cause.—*Quirk v. New Rockland Slate Co. et al.*, C.S., Montréal, Loranger, J., 30 mai 1892.

Charte de la cité de Montréal—Changement du niveau d'une rue—Juridiction des cours—Dommages.

Jugé, que les dispositions de la charte de la cité de Montréal, 52 Vic., ch. 79, sec. 213 et 227, relativement à l'évaluation de dommages par des commissaires, n'enlèvent pas aux cours de justice leur juridiction ordinaire pour condamner la cité à payer des dommages et pour faire établir ces dommages d'après les modes de preuve ordinaire.—*Lamarche v. La Cité de Montréal*, C.S., Montréal, Pagnuelo, J., 29 janvier 1892.

Locateur et locataire—Stipulation de non réparation—Maison inhabitable—Résiliation de bail—Dommages—Tarif.

Jugé : 1. Que malgré la stipulation que le locateur ne sera tenu de faire aucunes réparations, pas même celles que la loi impose au propriétaire, la maison louée doit être habitable et salubre, sinon, le locataire a le droit d'exiger les réparations nécessaires pour rendre cette maison habitable, et à défaut de réparations, la faculté de laisser les lieux.

2. Que, cependant, lorsqu'avant l'action, le locateur a offert de résilier le bail, l'action du locataire pour dommages et les frais, sera renvoyée.

3. Qu'aucun honoraire ne sera accordé pour des définitions de faits qui ne sont autre chose que les anciennes articulations de faits pour lesquelles il n'est rien accordé par le nouveau tarif.—*Bagg v. Duchesneau*, C.R., Montréal, Mathieu, Gill et Pagnuelo, JJ., 31 octobre 1892.

Connaissance—Fret—Art. 2454, C.C.

Jugé, que le consignataire de marchandises sous un connaissement qui déclare que le fret sera payable par le consignataire, ne peut, après réception de ces marchandises, refuser de payer ce fret au maître du navire sous le prétexte que celui qui lui a consigné ces marchandises était son débiteur et devait payer le fret.—*Gosselin v. Préfontaine*, C.S., Montréal, Pagnuelo, J., 30 juin 1892.

Corporation municipale — Responsabilité — Négligence — Rue rendue dangereuse par suite de causes climatiques — Faute commune.

Jugé: 1. Que lorsque une corporation a négligé d'entretenir une rue pendant l'hiver, elle ne peut échapper à la responsabilité qui résulte d'un accident, en plaçant que la rue s'est trouvée dangereuse par suite d'un dégel subit, son devoir étant d'y couper la glace et de couvrir les trottoirs de cendres.

2. Que néanmoins le demandeur, un vieillard, s'étant imprudemment engagé dans une rue à pente raide, sans grappins et avec des claques en caoutchouc usées, il y a lieu de mitiger les dommages à cause de la faute commune des parties.— *White v. Cité de Montréal*, C.S., Montréal, Pagnuelo, J., 29 janvier 1892.

Loi des licences — Certiorari — Exception à la forme — Art. 116 C.P.C., et 1074 S.R.P.Q.

Jugé: 1. Que le dépôt exigé par l'article 1074, S.R.P.Q., dans le cas de l'émanation d'un bref de *certiorari* contre une conviction, est de rigueur, et l'absence de ce dépôt entraînera le renvoi de l'action.

2. Que le défaut de faire ce dépôt peut être plaidé par exception à la forme.— *Benoit v. Desnoyers, & Lambe*, intervenant, C.S., Montréal, Loranger, J., 16 février 1892.

Corporation municipale — Responsabilité — Pente des rues — Dégel.

Jugé, que lorsqu'un trottoir a été constamment entretenu en bon état, et que l'accident qui y est arrivé ne peut être attribué qu'à un dégel considérable ainsi qu'à la pente de la rue, il n'y a pas lieu de tenir la corporation responsable de cet accident.— *Foley et vir v. Cité de Montréal*, C.S., Montréal, Pagnuelo, J., 29 janvier 1892.

Procédure — Signification — Exception à la forme — Art. 61, C.P.C.

Jugé, qu'une banque qui a son bureau principal à Québec et une succursale à Montréal, ne peut être assignée à cette succursale, mais que l'assignation doit être donnée au bureau principal de la banque. (Voir dans le même sens *Baxter v. The Union Bank of Lower Canada*, 7 L.N. 61.)— *Loignon v. La Banque Nationale*, Montréal, Jetté, J., 16 septembre 1892.

Railway Act of Canada—53 Vict. c. 28, sec. 2—Cattle killed on track while straying—Absence of cattle-guards—Liability of company.

Held :—Where animals escape from the land of their owner, without any fault or negligence imputable to him, and stray upon the highway. and thence get on to the railway track at the point of intersection owing to the absence of cattle-guards, and are killed on the track at some distance from the point of intersection, the company is liable.—*Cross v. Canadian Pacific R. Co.*, S. C., Bedford, Lynch, J., Sweetsburg, Nov. 15, 1892.

Municipal law—By-law—Invalidity—Action for assessment—Exemption.

Held :—1. The illegality of a by-law passed by a municipal council, within the limits of its powers, and of a collection roll, cannot be pleaded as a defence to an action for the recovery of a tax thereunder, unless the invalidity alleged be absolute and not merely the absence of a formality, where said by-law and collection roll have not been previously attacked and proceedings have not been taken within the proper time to set them aside. Hence the omission to publish a by law after its approval by the lieutenant governor in council, not being a nullity attaching to the substance, cannot be invoked as a defence to an action to recover taxes under the by-law.

2. The description in a by-law levying an assessment, that its object is to make an assessment for general purposes, is sufficiently precise and determinate.

3. A tax becomes due when the public notices required by Art. 960, M. C., are given by the secretary-treasurer. A rate-payer is not entitled to a notice demanding payment of the taxes due with a statement in detail.

4. The exemption from municipal taxation applicable to educational institutions, and to parsonage houses and their dependencies, under Art. 712, pars. 3, 4, M. C., does not extend to lots of land adjoining a private boarding school, kept by a rector of the Church of England in Canada in his rectory, the produce of which land is used by the family of the rector and his pupils.—*Corporation of the Village of Frelighsburg v. Rev. J. B. Davidson*, C. C., Sweetsburg, Lynch, J., Nov. 15, 1892.

Procedure—Action in forma pauperis.

Held, where leave has been granted to a party to institute a suit *in forma pauperis*, and such action has been dismissed, the original order granting leave to proceed *in forma pauperis* cannot be invoked to sustain a suit in renewal of the first suit.—*Noel v. White*, S. C., Montreal, Davidson, J., April 6, 1892.

Insurance, Life—Insurance Money Payable to Widow—Party Interested Dying Before Insured—Remarriage of Husband—Claim to Insurance Money Deposited Under Quebec Judicial Deposits Act.

P. effected an insurance on his life for the benefit of his wife. The wife died first, and by her will named P. her universal legatee. P. married again, the contract of marriage stipulating separation of property. There was never any assignment of the policy for the benefit of the second wife. P. predeceased his second wife, and by his will bequeathed all his property to his daughter by the first marriage. The amount of the policy being claimed both by the daughter and the second wife, the insurance company deposited the amount in court.

Held, that the daughter was entitled to the amount of the insurance.—*In re Aetna Life Insurance Co., Gaucher et al., and Gosselin*, petitioners, S. C., Montreal, Tait, J., December 28, 1892.

Advocate—Withdrawal from Suit—Action for Fees—Disbursements.

Held, 1. An advocate has no right of action for his fees until the cause wherein he claims them has been terminated by judgment, settlement, or discontinuance, or until his client has withdrawn his mandate from him.

2. An advocate cannot withdraw from a cause without the permission of the court or judge, and even where such withdrawal is regularly made it does not give the advocate a right of action against his client for his fees before the termination of the cause.

3. The fact that the client has employed another lawyer in another case in which he was concerned, and did not respond to a notice by his attorney to inform him what he intended to do in the case in which he represented him does not justify an advocate in withdrawing from a case, or give him a right of action for fees before the termination of the suit.

4. An advocate is not bound to advance moneys as disbursements in a cause, but where he does so he is not obliged to await the result of the suit before he is entitled to sue for the reimbursement of such advances.—*Loranger et al., v. Filiatrault et al.*, S. C., Montreal, Doherty, J., January 12, 1892.

Injur.—Burning in effigy—Minor—Responsibility.

Held, 1. Those who aid and abet, or take part in the hanging and burning of a person in effigy, with the object of bringing him into contempt, are jointly and severally liable in damages.

2. The father of minor children, who, although aware that his children were planning and abetting a proceeding of the above nature, did not interfere to restrain them, but actually encouraged them, is responsible for their acts.—*Lortie v. Claude et al.*, S.C., Montreal, Tait, J., April 2, 1892.

Procedure—Enquête—Foreclosure.

Held, Where a case has been inscribed for *enquête*, the plaintiff, on the day he closes his *enquête*, is not entitled to call upon the defendant to proceed with his *enquête* the same day, but should fix a subsequent day for that purpose. A foreclosure of defendant, and inscription upon the merits by the plaintiff, on the same day he closed his *enquête*, will be set aside as irregular.—*Compagnie de Prêt & Crédit Foncier v. Normand, & Guertin*, S.C., Montreal, Tait, J., April 30, 1892.

Substitution—Powers of curator—Opposition to seizure.

Held, The curator to a substitution, not being vested with the property of the substitution, has no quality or interest to make an opposition to the seizure thereof.—*Montreal Loan and Mortgage Co. v. Pilodeau, & Lavigne, es qual., opposant*, S.C., Montreal, Doherty, J., May 31, 1892.

Jurisdiction—Incidental demand.

Held, The Superior Court has no jurisdiction to dispose of an incidental demand made by the defendant in an action therein, for a sum less than \$100, where said demand is separate and distinct from the principal action, and has no connection with the de-

mand on which it is based.—*Thompson v. White*, S.C., Montreal, Doherty, J., March 12, 1892.

Procedure—Summary Matters.

Held, Where a case has proceeded to judgment as a summary case, it is not necessary that the writ of execution issued thereon should bear the words "summary proceedings," which are required on the writ of summons.—*La Banque Nationale v. Trudel et al., & Trudel et al., opposants*, S.C., Montreal, Davidson, J., February 23, 1892.

Testament—Legs—Présomption—C. C. 890.

Jugé, 1, La présomption établie par l'art. 890 du C. C. s'applique à tout legs fait au créancier ou au domestique du testateur, même à un legs purement rémunératoire.

2. Cette présomption ne peut être détruite que par une énonciation à cette fin dans le testament même, ou par l'aveu du créancier ou domestique poursuivant établi suivant les règles de la preuve.—*Marmen v. Royer es qual.*, C.S., Québec, Casault, J., 24 déc. 1892.

Mari et femme—Action personnelle—Autorisation à ester en justice.

Jugé, Que sur le refus du mari d'autoriser sa femme à ester en justice pour poursuivre un tiers qui l'a assaillie, le juge peut alors accorder cette autorisation.—*Ex parte Dame Lemieux*, C.S., Québec, Andrews, J., 30 août, 1892.

APPOINTMENT OF QUEEN'S COUNSEL.

The following appointments of Queen's Counsel in the Province of Quebec, have appeared in the *Canada Gazette* :—

Gazette, March 18 :—Jean Joseph Beauchamp, Montreal ; Frs. de Sales Alphonse Bastien, Montreal ; Joseph Alexandre Bonin, Montreal ; Selkirk Cross, Montreal ; Henry John Kavanagh, Montreal ; James Kirby, Montreal ; J. Bte. Gustave Lamothe, Montreal ; Frederick Debartzch Monk, Montreal ; Pierre Basile Mignault, Montreal ; Louis Conrad Pelletier, Montreal ; Alfred Rochon, Hull ; George Edwin Bampton, Lachute ; Guillaume

Amyot, Quebec; William Charles Languedoc, Quebec; C. E. Leonidas Dionne, Quebec; Pierre Alphonse Boudreault, Three Rivers; Thomas Brossoit, Beauharnois; Louis Henri Archambault, Montreal; William Guild Cruickshank, Montreal; François Xavier Choquet, Montreal; Joseph Adelard Descarries, Montreal; Hon. Louis Philippe Pelletier, Quebec; Edward John Hemming, Drummondville.

Gazette, March 25:—Hon. Pierre Laurent Damase Evariste LeBlanc, Montreal; Joseph Raymond Fournier Préfontaine, Montreal; Peter Joseph Cooke, Montreal; Alexander F. MacIntyre, Montreal; Hormisdas Jeannotte, Montreal; Philippe Arthur Olivier, Three Rivers; Joseph-Edouard Bédard, Quebec.

Gazette, April 1:—John Gleason, Rimouski; Charles Henry Stephens, Montreal.

Gazette, April 22:—Thomas James Doherty, Montreal; Thomas Patrick Foran, Aylmer; Edwin Botsford Busteed, Montreal; Lawrence Stafford, Quebec.

Gazette, April 29:—John Malcolm McDougall, Aylmer; L. N. Duplessis, Three Rivers; Louis Charles Bélanger, Sherbrooke.

Gazette, May 6:—Eugène Lafontaine, Montreal; Gershom Joseph, Montreal.

The above appointments all bear date March 7, 1893.

THE LATE LORD SHERBROOKE.

Lord Sherbrooke's Memoirs, which have just been published, contain some incidents of legal interest. After an unsuccessful struggle for the Professorship of Greek in Glasgow University, Lowe came to London, studied law, and was called to the Bar in 1842. Then came a crisis in his life. He resolved to take the best advice he could get as to the probability that if business came he should be able to do it:—

I consulted Lawrence, Travers, and Alexander. They said that I should become blind in seven years, recommended out-of-doors employment, and spoke of Australia or New Zealand as suitable places for the purpose. This strange advice entirely subverted and demolished the whole plan of my life. It is not very difficult to imagine the bitterness of such a revelation. To be told at eight-and-twenty that I had only seven more years of sight, and to think of the long night that lay be-

yond it, was bad enough; but the reflection that the object which I had struggled through a thousand difficulties with such intense labour to attain was lost to me was almost as bitter.

Lowe then set sail for Australia. Sydney was reached in October, 1842, and he soon obtained a fair amount of business. He was nominated by Sir George Gipps, the governor, to the Legislative Council, and as a debater he achieved an immediate success. This fact added to Lowe's fame at the Bar, and his biographer traces with great detail the subsequent period of his career in Australia.—*Law Journal*.

A LADY IN COURT.

The following piquant sketch of a first experience of the Old Bailey is from a letter to Miss Berry by Lady Dufferin, granddaughter of Sheridan and mother of Lord Dufferin, ex-Governor General of Canada. It is found in the life of Miss Berry and her sister by Lady Theresa Lewis, vol. iii, p. 497; and its humor is not unworthy of the wit of the "Critic," or the fun of the "Yacht Voyage to Iceland."

HAMPTON HALL, Dorchester,

Saturday (Oct. 14), 1846.

Your kind little note followed me hither, dear Miss Berry. As you guessed, I was obliged to follow my *things* (as the maids always call their raiment) into the very jaws of the law! I think the Old Bailey is a very charming place. We were introduced to a live Lord Mayor, and I sat between two sheriffs. The Common Sergeant talked to me familiarly, and I am not sure that the Governor of Newgate did not call me "Nelly." As for the Rev. Mr. Carver (the ordinary), if the inherent vanity of my sex does not mislead me, I *think* I have made a deep impression there. Altogether my Old Bailey recollections are of the most pleasing and gratifying nature. It is true I have only got three pairs and a half of stockings, one gown, and two shawls; but that is but a trifling consideration in studying the glorious institutions of our country. We were treated with the greatest respect and ham sandwiches, and two magistrates handed us down to our carriage.

HAMPTON COURT, October 22nd.

My mother and I have returned to this place for a few days in order to make an ineffectual grasp at any *remaining* property. Of course you have heard that we were robbed and murdered the other night by a certain soft-spoken cook who headed a storming-party of banditti through my mother's kitchen window; if not, you will be see the full, true, and dreadful particulars in the papers, as we are to be "had up" at the Old Bailey on Monday next for the trial. We have seen a good deal of life and learned a great deal of the criminal law of England this week,—knowledge cheaply purchased at the cost of all my wardrobe, and all my mother's plate. We have gone through two examinations in court; they were very hurrying and agitating affairs, and I had to kiss either the bible or the magistrate, I don't know which, but it smelt of thumbs.

I find that the idea of *personal property* is a fascinating illusion, for our goods belong in fact to our country and not to us; and that the petticoats and stockings which I fondly imagined *mine* are really the petticoats of Great Britain and Ireland. I am now and then indulged with a distant glimpse of my most necessary garments in the hands of different policemen; but "in this stage of the proceedings" may do no more than wistfully recognize them. Even on such occasions the words of justice are: "Police-man B 25, produce *your* gowns;" "Letter A 26, identify *your* lace;" "Letter C, tie up *your* stockings." All this is harrowing to the feelings, but one cannot have *everything* in this life. We have obtained *justice*, and can easily wait for a change of linen. Hopes are held out to us that at some vague period in the lapse of time we may be allowed to *wear* all of our raiment,—at least so much of it as may have resisted the wear and tear of justice; and my poor mother looks confidently forward to being restored to the bosom of her silver teapot. But I don't know. I begin to look on all property with a philosophic eye as unstable in its nature; moreover the police and I have had my clothes so in common that I shall never feel at home in them again. To a virtuous mind the idea that "Inspector Dawsett" examined into all one's hooks and eyes, tapes and buttons, is inexpressibly painful. But I cannot pursue that view of the subject."—*The Green Bag*.

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CURRENT TOPICS AND CASES.

In *Carlill v. Carbolic Smoke Ball Co.* is an example of a contract created by advertisement, and performance of condition stated therein. The defendants, proprietors of a medical preparation called "Carbolic Smoke Ball," issued an advertisement in which they promised to pay £100 reward to any person who contracted the disease known as "influenza," after having used one of the balls, in a certain specified manner and for a certain specified period; and that they had deposited £1000 in a certain bank to show their sincerity in the matter. The plaintiff, upon the faith of the advertisement, purchased one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza. The English Court of Appeal (Dec. 7, 1892) held that the offer in the advertisement, coupled with the performance by the plaintiff of the conditions specified therein, created a valid contract. Lord Justice Lindley said:—"We are dealing with an express promise to pay £100 in certain events. There can be no mistake about that at all. Read this how you will, and twist it about as you will, here is a distinct promise, expressed in language which is unmistakeable, that £100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts influenza after having used the ball three times daily, and so on. * * * The deposit is called in aid by the advertisers as proof of their sincerity in the matter."

Failure to assist a sick passenger to alight from a train at the place of his destination led to serious consequences in *Weightman v. Louisville, N. O. & T. R. Co.*, decided by the Mississippi Supreme Court, March 20, 1893. The Court held that where a railway company received a sick passenger, with the consent of the conductor of the train and the ticket agent, who were informed of his serious illness, and of the necessity of his having assistance when he should arrive at his destination, but the conductor failed to have him aroused and put off there, but carried him thirty miles beyond, where he was put off, alone, at a small station, at 2 a.m., and allowed to remain there forty hours before being returned to his destination on one of the Company's trains, and his illness was so increased during his exposure that he died, the Company was liable.

A notable event of the past month was the completion by Mr. Strachan Bethune, Q.C., of his fiftieth year at the bar. The *tableau* shows that Mr. Bethune was admitted in May, 1843, but were it not for this evidence few would suspect from the robust appearance and active habits of the gentleman referred to that half a century had flown. We are sure that his *confrères* all join heartily in the wish that his familiar figure may long be seen in the usual haunts of active practitioners.

SUPERIOR COURT—DISTRICT OF OTTAWA.

AYLMER, February 24, 1887.

Coram WURTELE, J.

EGAN et al. v. THOMSON.

Sale—Warranty—Constituted rents representing cens et rentes.

HELD:—1. A vendor of real estate is not bound by law to warrant the purchaser against *rentes constituées* representing *cens et rentes*; and therefore in the absence of a special warranty in the deed, a sale of lands situate within the limits of a seigniorie is subject to such constituted rents, arrears excepted.

2. *Words of warranty in a deed, which say that the sale is made "with promise of warranty against all gifts, dowers, debts, hypothecs, substitutions, alienations and other hindrances whatsoever," are no more than an enunciation of the ordinary warranty of law, and do not imply any conventional warranty against a constituted rent representing cens et rentes.*

The judgment was as follows :—

"The Court etc.,

"Seeing that the present action is brought to recover from the defendant the balance of \$400 of the price of lots Nos. 21 and 22 of St. Amélie Range in the Parish of Ste Angélique, sold by the plaintiffs or their authors to the defendant by deed of sale passed before M^{re}. E. d'Odette d'Orsonnens, Notary, on the 22nd day of November, 1881, with interest accrued and to accrue thereon;

"Seeing that the defendant pleads that the lots in question are situate in the Seigniority of Petite Nation and that they are charged under and by the *cadastre* of the seigniority with an annual constituted rent representing the *cens et rentes* of \$11.80, on a capital of \$196.67, and that certain arrears of such constituted rent and also certain arrears of school and municipal taxes were due at the time of the sale; that the defendant tendered and has since his tender deposited in court the balance of the plaintiffs' claim after deduction of the capital of the constituted rent and of the arrears above mentioned; and that he prays by his dilatory exception to be allowed to delay the payment of the amount representing the capital of the constituted rent until the plaintiffs cause the same to be discharged or give security that he will not be disturbed thereby, and by his peremptory exception that the action be dismissed for the present to the extent of the amount of such capital;

"Considering that by law a vendor was not bound to warrant a purchaser against seigniorial duties and charges when not declared, as no one was presumed to ignore the existence thereof, and that on the contrary lands situated in seigniories were always presumed to be conveyed subject to such seigniorial duties and charges unless there was a special conventional warranty that such lands were free and discharged therefrom;

"Considering that a constituted rent representing *cens et rentes* is a charge inherent to all lands situate within the limits of a seigniority, that every such constituted rent is substituted by the Consolidated Seigniorial Act for all seigniorial duties and charges

to which the land charged therewith was subject, and is secured by the same privileges as such duties and charges, and is further assimilated to seigniorial duties and charges by being declared by legislation subsequent to the Consolidated Seigniorial Act (32 Vic., ch. 30, s. 3,) to be imprescriptible as regards the capital notwithstanding mutations of the land charged therewith, and that a Cadastre made in virtue of the said Consolidated Seigniorial Act is a final title in favor of the seignior for all constituted rents established thereby and is a public document, recognized moreover by subsequent legislative acts, of the existence of which all persons are bound to have cognizance ;

“ Considering moreover that the principle, that lands charged with constituted rents created in the place of seigniorial rights are, in the absence of any express conventional warranty, conveyed subject to such rents as being a charge inherent to all lands situate in seigniories, is recognized by article 659 of the Code of Civil procedure and by section 54 of the Consolidated Seigniorial Act, which section expressly declares that in the event of a sale under a writ of execution “ every such immoveable “ property shall be considered as having been sold subject there- “ after to all such rights, charges, conditions or reservations, “ without it being necessary for the seignior to make an opposi- “ tion for the said purpose before the sale ; ”

“ Considering that in the present case the words of warranty contained in the deed of sale are simply the enunciation of the ordinary warranty of law and are purely a matter of style, and that they do not imply any conventional warranty against the constituted rent complained of ;

“ Considering that the lots in question were sold to the defendant subject to the constituted rent established by the cadastre and that his dilatory and peremptory exceptions are therefore unfounded ; and that his tender was and deposit is insufficient ;

“ Considering, however, that the plaintiffs are liable for all arrears of such constituted rent and of school and municipal taxes due at the time of the sale ;

“ Seeing that such arrears amounted to \$35.40 for the constituted rent, \$6 for school taxes and \$1.60 for municipal taxes, forming in all \$43, that the same being deducted from the said sum of \$400, leaves a balance due to the plaintiffs of \$357, with interest at 7 per centum per annum from the 22nd day of November, 1881 ;

"Doth overrule and dismiss the dilatory exception pleaded in this cause, with costs, and doth adjudge and condemn the defendant to pay to the plaintiffs the said balance or sum of \$357, with interest thereon at the rate of 7 per centum per annum from the said 22nd day of November, 1881, until payment, with costs of suit." ¹

J. R. Fleming, Q.C., for plaintiffs.

Asa Gordon, for defendant.

AUTHORITIES REFERRED TO.

Pothier, Vente.

No. 194. Les charges que l'acheteur est censé ne devoir pas ignorer, et dont en conséquence le vendeur n'est pas tenu de garantir l'acheteur, quoiqu'elles n'aient pas été expressément déclarées par le contrat, sont,—1o. toutes celles qui sont de droit commun.

No. 196. Les droits et devoirs seigneuriaux, tels qu'ils sont réglés par les coutumes, sont aussi des charges des héritiers, qui n'ont pas besoin d'être déclarées par le contrat de vente, lorsque les héritages sont situés dans les provinces où est établie la maxime, *nulle terre sans seigneur*; la présomption étant que l'héritage relève de quelque seigneur ou à fief ou à cens.

Consolidated Statutes of L. C., ch. 41.

Section 33, par. 2. From and after the publication of such notice, with respect to any seignior, every *censitaire* therein shall hold his land in franc-aleu roturier, free and clear of all seigniorial rights and dues, except the *rente constituée* substituted for the *cens et rentes*.

Consolidated Statutes of L. C., ch. 41.

Section 54. No sale under Writ of Execution shall have the effect of liberating any immovable property theretofore held à *titre de cens* from any *rente constituée*, payable thereon under the schedule of the seignior, but shall be considered as having been sold subject thereto, without it being necessary for the seignior to make an opposition for the said purpose before the sale.

(¹) The above judgment was unanimously confirmed by the Court of Review, Montreal, Johnson, Taschereau and Gill, JJ., April 30, 1887.

32 *Victoria*, ch. 30.

Section 1. The Schedule made and deposited for a seigniority is a final title in favor of the seignior for the constituted rents established to represent the seigniorial rights.

Section 3. The capital of constituted rents is not subject to prescription, whether the land charged has changed proprietor or not.

COURT OF APPEAL ABSTRACT.

Loi Seigneuriale—Droit de pêche.

Jugé:—1. Le droit de pêche sur les rives du St. Laurent, bornant les seigneurics, n'en était pas un accessoire et n'appartenait pas au seigneur auquel il n'avait pas été spécialement accordé.

2. Ce droit, lorsqu'il avait été accordé au seigneur, n'était pas sous-inféodé sans concession expresse et spéciale; et le seigneur, auquel le donne son titre, peut empêcher le censitaire riverain, qui n'en a pas, de tendre une pêche sur la grève du St. Laurent à laquelle sa terre aboutit.—*Fraser et al. & Fraser et al.*, Québec, Lacoste, J. C., Baby, Blanchet, Hall, Wurtele, JJ., 4 avril, 1893.

Community—Continuation of—Art. 1323, C. C.

A community of property existed between husband and wife. There was one child, issue of the marriage. The husband dying, the surviving consort failed to have an inventory made of the common property, and (the child being then a minor) the surviving consort married a second time without marriage contract.

Held:—In the absence of any demand on the part of the minor for continuation of community, a tripartite community did not exist between the surviving consort, her second husband, and the child by the first marriage; and an option for continuation made by the child 45 years after the dissolution of the first community had no effect.

2. Where the consort *commun en biens* who dies first has bequeathed all his property to a person or persons other than his children, the latter, being without interest, are not entitled to demand that an inventory be made, and default to make it cannot create any right in their favor.—*Pearson & Spooner*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ., September 26, 1892.

Expropriation—Award of arbitrators—When interfered with by the court.

Held :—In the matter of a railway expropriation, an award of arbitrators who have had the advantage of viewing and examining the property taken and also the property affected by the construction of the railway, should only be altered by the court when it is shown that the arbitrators were influenced by improper motives, or when the evidence clearly and conclusively establishes that they erred in fixing an amount undoubtedly too high or undoubtedly too low.—*Compagnie du chemin de fer de Montréal & Ottawa, & Bertrand*, Montreal, Sir A. Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., April 26, 1893.

Expropriation—Award—Interference with.

Held :—In cases of expropriation, where the arbitrators or commissioners are experienced in the valuation of real estate, and where in addition to hearing the opinion of the expert witnesses produced they have had the advantage of examining the property to be taken, the court, before making an increase or reduction of the award, will require either proof of improper motives on their part, or evidence showing conclusively that an error has been committed in fixing the amount of the compensation.—*La Compagnie du chemin de fer de Montréal & Ottawa & Castonguay*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., April 26, 1893.

Conditions au dos de police—Courte prescription—C. C. 2184.

Jugé :—Il n'est pas nécessaire que l'assuré accepte ou signe les conditions qui se trouvent au dos de la police, lorsque cette dernière contient une clause disant que ces conditions forment partie du contrat; et si l'assuré, après avoir reçu ce contrat, ne le répudie pas, mais, au contraire, en fait la base d'une action pour réclamer le montant qu'il couvre, il ne peut pas objecter à une partie de l'instrument et se servir de l'autre.

La clause dans une police d'assurance que toute poursuite doit être intentée dans les trois mois du sinistre ou du rejet de la réclamation, est licite, et ne viole pas les dispositions de l'art. 2184, C. C., qui défend de renoncer d'avance à une prescription non acquise.—*Simpson & Caledonian Insurance Co.*, Québec, Sir A. Lacoste, J. C., Baby, Bossé, Blanchet, Wurtele, JJ., 10 janvier 1893.

Bornage—Surveyor's line—Township line.

The plaintiff's title gave him a lot of land in the township of Upton, and the defendant's title gave him one in the contiguous township of Grantham. Both titles were posterior to the verification of the township line by a government surveyor, and to a statute confirming the line surveyed and marked out by him, and in each title the rear boundary (where the lots adjoined) was stated to be the township line.

Held, that, in the absence of any right acquired by either of the parties by prescription beyond the township line, that line must be their boundary, without regard to measurements given in the titles.—*Duguay & Vincent*, Quebec, Baby, Bossé, Blanchet, Hall, Wurtel, JJ., April 4, 1893.

*SUPERIOR COURT ABSTRACT.**Procédure—Piece essentielle.*

Jugé :—Du moment qu'à sa face même une pièce essentielle au soutien d'une cause n'appert avoir été produite qu'après que la cause a été plaidée, l'action—sur Révision,—doit être renvoyée sans réserve du droit de la recommencer; et ce, alors même qu'il n'a été fait aucune demande pour faire mettre ce document hors du dossier, et que le jugement de première instance constate que le juge qui l'a rendu s'est appuyé sur la dite pièce pour le rendre. —*Corporation de St. Henri v. Gagnon*, C. R., Québec, Routhier, Caron, et Andrews, JJ., 28 février, 1893.

Séduction—Dommages—Paternité—Aliments—C. C. 241—Prescription—C. C. 2261.

Jugé :—L'action en déclaration de paternité et pour des aliments est un droit exclusif de l'enfant, qui ne peut pas être exercé par la mère ni par le tuteur nommé à la mère mineure, les droits de la mère n'étant qu'aux dommages que lui a causé la séduction.

L'enfant naturel ne peut faire condamner à lui fournir des aliments l'auteur réel ou supposé de la grossesse de sa mère, qu'en le faisant déclarer son père.

Kingsborough & Pound, 4 Q. L. R. 11; *Bilodeau v. Tremblay*, 3 R. L. 445; *Giroux v. Herbert*, 5 R. L. 638, critiquées.

La fille séduite n'a pas d'action en dommages avant son enfanement, et par conséquent la prescription de deux ans (C. C. 2261) ne commence à courir que de ce moment.

La fille devenue mère n'a de recours en dommages contre son prétendu séducteur que lorsqu'elle n'a cédé qu'à une promesse de mariage actuelle ou présumée; lorsque (comme dans l'espèce) l'appât de sa faute n'a pas été l'espoir d'un mariage, mais celui d'échapper à la grossesse, elle n'a pas d'action en dommages.—*Mullin es qualité v. Bogie*, C. R., Québec, Casault, Caron, Andrews, JJ., 31 janvier, 1893.

Promissory note—Prescription—Interruption.

Held:—A judgment obtained against the maker and first endorser of a promissory note interrupts prescription as against the other endorsers.—*Thibaudeau v. Pauzé*, S. C., Montreal, Davidson, J., March 15, 1892.

Locateur et locataire—Résiliation d'un bail—Compétence.

Jugé, que quand la demande de résiliation d'un bail est intentée au milieu du terme de location, la compétence du tribunal se règle d'après la somme qui représente, à ce moment, l'intérêt des parties.—*Thivierge v. Moineau*, C. S., Montréal, Jetté, J., 2 avril 1892.

Action paulienne—Complicité du tiers acquéreur—Fraude—Saisissabilité d'un montant adjugé pour libelle—Articles 1038 C. C., et 558 C. P. C.

Jugé, 1. Que pour faire maintenir l'action paulienne contre un tiers acquéreur, par contrat à titre onéreux, il faut alléguer et prouver la complicité de ce tiers-acquéreur en la fraude commise.

2. Que le débiteur, même insolvable, conserve la libre disposition de ses biens, et que l'aliénation qu'il en fait de bonne foi et sans fraude est valable même à l'encontre de ses créanciers.

3. Que le montant adjugé pour libelle est saisissable (*Archambault & Lalonde*, M. L. R., 3 Q. B. 486).—*Desrosiers v. Meilleur et al., & Wurtele* (mis en cause), C. S., Montréal, Jetté, J., 12 mars 1892.

Saisies concurrentes—Art. 642, C. P. C.

Jugé :—Que lorsque plusieurs brefs de saisie, contre le même débiteur, sont remis au shérif en même temps, il doit procéder d'abord sur le premier en date, et s'ils sont tous de même date, il doit procéder sur celui qui se trouve pour la somme la plus élevée.—*La Banque Nationale v. Aubertin, & Aubertin, C. S., Montréal, Jetté, J., 2 avril, 1892.*

Transport d'un droit litigieux—Huissier—Articles 1486, 1583 C. C.

Jugé :—Qu'une convention en vertu de laquelle le défendeur s'était engagé à payer la somme de \$500 si un tableau attribué au Corrège, dont il avait acquis la propriété pour un tiers, était prouvé authentique, crée une créance d'une nature litigieuse, et que l'acquisition de cette créance par le demandeur, huissier de la cour supérieure, était nulle.—*Reed v. Helbronner, C. S., Montréal, Mathieu, J., 9 mai, 1892.*

Corporation municipale—Ruelle privée—Responsabilité.

Jugé :—Qu'une corporation municipale qui a permis au public de se servir d'une ruelle privée et y a construit un égout et numéroté les maisons qui s'y trouvaient, est responsable d'un accident arrivé par suite du défaut d'entretien du trottoir de cette ruelle.—*Gilligan et vir v. La cité de Montréal, C. S., Montréal, Loranger, J., 5 mars, 1892.*

Occupation avec permission du propriétaire—Congé—Art. 1608, C. C.

Jugé :—Que le contrat en vertu duquel un propriétaire permet à une personne d'occuper un immeuble à charge d'exercer une surveillance sur cet immeuble, d'administrer les moulins qui s'y trouvent et de pensionner et loger ce propriétaire et sa famille de temps à autre, constitue un contrat innomé qui se rapproche plus du bail que de tout autre contrat, et que les règles du louage s'y appliquent.

Que dans ces circonstances, l'occupant a droit à un congé de trois mois avant de pouvoir être expulsé de cette propriété.—*Brunet v. Berthiaume, C. S., Montréal, Jetté, J., 23 avril, 1892.*

Opposition—Frais.

Jugé :—Que le créancier qui saisit imprudemment des biens qui appartiennent à un tiers, sera, malgré sa bonne foi, condamné à payer les frais de l'opposition faite par ce dernier.—*McNamara v. Gauthier, & Carle*, opposant, C. S., Montréal, Jetté, J., 21 mars, 1892.

Quo warranto—Marguillier, élection de—Enregistrement des votes—Inscription en faux—Dépôt en révision.

Jugé :—1. Lorsqu'à une élection de marguillier, l'enregistrement des votes est demandé par deux ou plusieurs électeurs, le curé qui préside l'assemblée doit y procéder même si la chose n'a jamais été faite dans la paroisse, et s'il a toujours été d'usage d'y constater la majorité en divisant l'assemblée en deux partis; le président de l'assemblée doit ainsi enregistrer les votes même si la demande n'en est faite qu'après que l'on a divisé l'assemblée, mais avant que le président ait proclamé aucun candidat; et s'il n'enregistre pas les votes lorsque la demande lui en est ainsi faite, l'élection est nulle.

2. Une élection nulle pour cette cause ne peut être ensuite validée à une assemblée subséquente qui refuse d'accepter la démission du candidat ainsi élu illégalement, et l'élection doit tomber ou être maintenue sur son propre mérite d'après ce qui s'est passé à l'assemblée à laquelle elle a eu lieu d'abord.

3. On ne peut prouver par témoins, et sans le préliminaire d'une inscription en faux, contre ou outre le contenu du registre de délibérations d'une fabrique.

4. Un seul dépôt en révision suffit, même lorsque la révision porte et sur le mérite de la cause et sur une inscription en faux, surtout si les deux contestations ont été réunies en première instance.—*Thampoux v. Paradis*, C. R., Québec, Casault, Routhier, Caron, JJ., 30 septembre, 1890.

Vente d'immeubles par femme séparée, sans autorisation—Action en déclaration de nullité par mari—Intérêt né et actuel—C. C. 183.

Jugé :—Le mari séparé de corps n'a pas d'action pour faire prononcer la nullité de la vente faite par sa femme, sans son autorisation ou celle de la justice, d'un immeuble qui lui appartient, s'il n'a pas un intérêt né et actuel.

L'intérêt né et actuel de l'article 183 du code civil est un intérêt pécuniaire immédiat. Un simple intérêt moral, comme celui de faire respecter son autorité maritale, ou un intérêt pécuniaire éventuel, comme celui résultant du danger que sa femme revienne plus tard réclamer de lui une pension alimentaire, n'est pas un intérêt suffisant aux termes de l'art. 183.—*Letourneau v. Blouin et al*, C. S., Québec, Andrews, J., 21 novembre 1892.

Pledge—Abuse of—C. C. 1975—Conditional obligation—C. C. 1084.

Held : 1. The pledgee who applies to his own uses a sum of money pledged as security for the payment of a note, is guilty of an abuse of the pledge, within the meaning of article 1975 C. C., sufficient to justify the pledgor in demanding repayment of such money with interest.

2. Where the return of money pledged as security for the payment of a note is conditioned upon the collection by the pledgee of the amount of such note, the fact that he has been himself the means of preventing the collection of the note, (as by releasing one of the parties thereto, the others being insolvent,) will make the conditional obligation (to return the money) absolute.—*Pacaud v. La Banque du Peuple*, S. C., Quebec, Andrews, J., 17 January, 1893.

Intervention—Lien de droit—Défense en droit—Exciper du droit d'autrui.

Jugé :—Le défendeur en garantie, qui se porte aussi intervenant dans l'instance principale, a intérêt et droit de rester en cause et faire décider du mérite de son intervention, même après le renvoi de l'action en garantie.

Le propriétaire riverain qui, en vertu de l'acte d'incorporation de la cité de Québec, est seul responsable de l'entretien du trottoir devant sa propriété, a intérêt à intervenir dans une action portée contre la cité pour des dommages causés par le mauvais état de tel trottoir, et n'excipe pas du droit d'autrui en soulevant, par défense en droit, le manque de lien de droit entre le demandeur et la cité.—*Séguin v. Cité de Quebec*, et *Drouin*, intervenant, C. S., Québec, Routhier, J., 14 février 1893.

*Dommages—Libelle dans un plaidoyer—Allegation de fraude—
Bonne foi—Cause probable.*

Jugé :—Un plaidoyer contenant une accusation de fraude peut former la base d'une action en dommages pour libelle, si tel plaidoyer, quoique pertinent à l'issu, est produit avec malice et intention de nuire. Il en est autrement d'un plaidoyer fait de bonne foi et où la partie avait cause probable pour sa croyance que l'acte attaqué était réellement frauduleux.—*Matte v. Ratté*, C. S., Québec, Routhier, J., 14 février 1893.

*Cité de Montréal—Licences de charretier—Non résidents—
Mandamus.*

Jugé :—Qu'aux termes de ses règlements actuellement en force et de sa charte, la cité de Montréal est tenue, sur paiement des droits fixés, d'accorder, tant que les cadres ne sont pas remplis, des licences de charretiers aux non résidents, comme à ceux qui sont domiciliés dans les limites de la cité.

Qu'au cas du refus d'octroyer telle licence, on peut se pourvoir contre la cité par voie de *mandamus* pour la forcer d'accorder la licence demandée.—*Parent v. La cité de Montréal*, C.S., Montréal, Gill, J., 7 juin 1892.

Locateur et locataire—Dommages—Articles 1614, 1627 C. C.

Jugé :—Que bien que le locateur soit garant envers le locataire de tous les vices de la chose louée qui en empêchent ou diminuent l'usage, soit que le locateur les connaisse ou non, cela s'entend de la diminution du loyer ou de la résiliation du bail, mais que le locateur ne doit de dommages au locataire que lorsqu'il connaissait le vice de la chose louée.—*Juteau et al. v. Magor*, C.S., Montréal, Pagnuelo, J., 19 avril 1892.

*Droit municipal—Cour de Commissaires—Recouvrement de sommes
imposées pour travaux—Articles 398 et 1042 C.M.*

Jugé :—Que la cour des commissaires n'a pas juridiction pour le recouvrement de sommes pour travaux exécutés par l'inspecteur de voirie.—*Gauthier v. La Corporation de la Paroisse de Ste. Marthe*, C.S., Montréal, Jetté, J., 14 juin 1892.

Privilege du locateur—Pensionnaire—Art. 1622 C. C.

Jugé:—Qu'une personne qui pensionne chez le locataire d'une maison et qui a notifié le locateur de cette maison qu'il était propriétaire de certains effets qui la garnissaient, peut faire distraire ces effets de la saisie-gagerie pratiquée par le locateur, ces effets étant censés n'être sur les lieux qu'en passant, aux termes de l'art. 1622 C. C.—*Clarke v. J. State, & W. State*, intervenant, C. S., Montréal, Taschereau, J., 17 juin 1892.

CUSTODY OF CHILDREN—THE GOSSAGE AND GYNGALL CASES.

Of the numerous disputes in which Dr. Barnardo has been engaged with the relations of children admitted into his asylum, Gossage's is the most important from a lawyer's point of view. In that case the House of Lords decided (61 Law J. Rep. Q. B. 728) that where a person charged with unlawfully detaining a child has absolutely ceased to have any control over it, a writ of *habeas corpus* ought not to issue, even though he gave up the child from the apprehension that by retaining it he might become liable to a writ. In so deciding, the House of Lords overruled the decision of the Court of Appeal in Tye's case (*Regina v. Barnardo*, 58 Law J. Rep. Q. B. 553), that it is no excuse for non-compliance with the writ that the defendant has wrongfully handed over the child to another, and that under such circumstances an attachment must issue for disobedience to the writ. The House of Lords said, however, that a mere colourable transfer of the child to a person acting under the direction of the defendant will not avail the latter. Furthermore, anyone parting with the possession of a child after being served with the process of the Court, and, perhaps, even after receiving notice that proceedings will be taken, is guilty of contempt. The case came again before a Divisional Court last week for further investigation of the facts. It appeared that the boy Gossage, having been found destitute, was sent to Dr. Barnardo's Home. Afterwards the mother of the lad demanded to have him given up to be placed in a Roman Catholic institution. Dr. Barnardo thereupon handed him over to a stranger, to be adopted by the latter and taken to Canada, but made no enquiries about the identity or the circumstances of this person. The Court thought that Dr. Bar-

nardo had acted thus in order that all traces of the boy might be lost, and they came to the conclusion that Dr. Barnardo did, in fact, not know where the boy was. They therefore held, in accordance with the decision of the House of Lords, that the return to the writ was sufficient. When one considers the length of time that this case has been before the Courts, one must regret that (as the House of Lords ruled) an appeal lies against an order for the issue of a writ of *habeas corpus*. The writ was issued on November 23, 1889, the matter came before the Court of Appeal in 1890, and was only disposed of by the House of Lords in July, 1892. Such a delay may sometimes defeat the purpose for which the writ has been obtained, and ought to be impossible.

Another important case relating to the custody of a child was disposed of last week by the Court of Appeal. In *Regina v. Gynqall* the mother of a girl, aged fifteen, sought to compel a schoolmistress, who was training the child to be a schoolmistress, to give her up, against the child's wish. The mother, who was a lady's maid, and when out of employment a dressmaker, had been obliged, in earning her livelihood, to move about from one place or country to another, and, through no fault of her own, had been unable to bring up the girl personally. The case did not fall within the Custody of Children Act, 1891, for the mother had not abandoned nor deserted the child, nor proved herself unmindful of her parental duties. On her behalf it was contended that a parent is absolutely entitled to the custody and guardianship of his or her children, unless this right is forfeited by misconduct, and the Court allowed that this right exists at common law, though it is subject to certain statutory limitations; but they said, further, that the Court of Chancery had from time immemorial exercised a parental jurisdiction, by virtue of which, even without any misconduct on the part of the parent, the rights of the latter are superseded, when in the opinion of the Court this is essential for the welfare of the child. This being the case of an intelligent girl, who in another year would be in a position to earn her living and choose where she would live, the Court thought that it would be almost cruel to take her away from her present surroundings, especially as the mother would be obliged to place her with strangers. Therefore they affirmed the order of a Divisional Court discharging the writ, on the respondent giving an undertaking to educate and maintain the girl.—*Law Journal (London)*.

EDITOR AND CONTRIBUTOR.

In *Macdonald v. The National Review*, his Honour Judge Lumley Smith (of the Westminster County Court) pronounced a decision which, if upheld on appeal, will materially, and as we think injuriously, affect the relations of editors and their contributors. The facts are these. The plaintiff, Mr. W. A. Macdonald, a Canadian journalist, sought to recover from the proprietors of *The National Review* the price of an article which he had written and submitted to the editor's consideration, *ex proprio motu*, and which had been set up in type, sent to him for correction, and returned revised. The article was not published within what Mr. Macdonald deemed "a reasonable time;" he complained of its non-appearance, and got back the manuscript, with an implied refusal to insert it, by return of post. The plaintiff contended that by putting his manuscript in type and sending him a proof for revision the editor had in law "accepted" his article, and was bound to publish or pay for it within a reasonable time. The defendants, on the other hand, maintained, and adduced what appears to us to have been strong evidence to prove, that this position was, according to journalistic custom, untenable. But his Honour Judge Lumley Smith agreed with the plaintiff, and held that to print a manuscript and (presumably) send the author a proof for correction is to exercise over it the *dominium* which constitutes an acceptance in law. We are far from satisfied that the judgment in this case is sound. The question at issue was one of custom, and his Honour's decision seems to us to have been against the weight of evidence. But if the learned judge is right, and if an article, ultroneously written and sent to a journal, is accepted whenever the editor puts it in type, and must be published or paid for within what a Court of law not endowed with journalistic instincts or guided by journalistic experience considers a reasonable time, we can only say that the difficulty which the free-lance or "outside" contributor at present finds in penetrating the charmed circle of journalistic success will be tenfold increased. It is stated that action in the case of *Macdonald v. The National Review* was taken at the instance of the Society of Authors. We doubt whether that excellent body has gained anything better than a Pyrrhic victory, in which the conquerors will ultimately lose more than the vanquished defendant. —*Law Journal (London)*.

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CURRENT TOPICS AND CASES.

Baron Courcel, the president of the Behring Sea Arbitration, has not been sparing of compliments to the counsel who addressed the court. So eulogistic were his expressions to the United States counsel (as reported by cable) that it seemed as if words would fail him when the turn of the opposing counsel came. But the president, as reported, referred also in the highest terms to the rhetorical power of Attorney-General Russell's ten days' speech, and at the close of Sir Richard Webster's address he declared that the court was deeply indebted to him for the elaborate study he had made of the case, and expressed his admiration of "the unrestricted and friendly cooperation of yesterday's attorney-general with to-day's attorney-general," adding that the country was indeed to be envied "where party spirit admits of such cordial brotherly association of political rivals when the national interest is at stake,"—which seems to travel a little outside of the special duty assigned to Baron Courcel.

In *Mitchell v. Bradstreet Co.*, the Supreme Court of Missouri held, May 2, 1893, that a false publication by a commercial agency as to the solvency of a business firm is not privileged where the publication sheet is issued to all the subscribers of the agency without regard to their being creditors of the firm.

In *Baltimore & Ohio R. Co. v. Baugh*, the Supreme Court of the United States held, April 24, 1893, that a railroad company is not responsible for a personal injury to one of its firemen caused by the negligence of its locomotive engineer.

At the Lord Mayor's banquet in London, on June 7, the Lord Chancellor, in reponse to the toast of "Her Majesty's Judges," referred to some of the complaints which are commonly urged against the administration of the law, and the possibility of applying a remedy. The judges, he said, were alive to the fact that they could only discharge their functions so long as they deserved and enjoyed the confidence of their fellow-countrymen. There were none more conscious than the judges that the law and its administration were not all that could be desired. He wished on that occasion—as filling practically the position of Minister of Justice—to recognise the co-operation of the Bench in his endeavours to improve the administration of the law. The judges had sacrificed no small amount of time and labour to pointing out the defects of the system. The remedy was, unhappily, less visible than the disease. There were two points to be kept in view—expense, which was to be strenuously avoided, and expedition, which was no less earnestly to be sought. But it was difficult to apply the remedy. Each class was keen to see the defects of the other, but the different classes were not so ready to recognise evils in which they were personally interested. It was said that the expense of litigation largely consisted in the fees of counsel. But the remedy was easy. There were abundance of counsel who would do the work cheaply. But the people insisted on particular counsel, and if they indulge in luxury they must expect to pay for it. If people complained of the dearth of champagne, let them drink bottled beer or cheap champagne. A great picture by an English artist had recently been sold for many

thousands of pounds. The same canvas might have been brilliantly covered for as many thousand pence. Thus the remedy for this evil was ready at hand. If men were not content with this advice, he would say, 'Don't go to law.' At the same time he was desirous that every needless step in litigation should be abolished. It was in that direction that the judges were working. In late years expedition had been achieved to a very large extent. He remembered in his early days when one had to wait a year for a trial in Middlesex, and two or three years for an appeal to the House of Lords. Now they were hearing appeals in the House of Lords which were set down only two or three months ago; and there were no arrears in the Privy Council or the Court of Appeal, which was hearing appeals from decisions pronounced only three or four weeks ago. The solicitor-general added that he was firmly convinced, whatever was done to simplify the law, that it would never be a cheap luxury for the litigant. It would always be expounded at the expense of litigants for the benefit of those who were not litigants. A good deal of English litigation was due, not to a love of justice, but to the sporting instincts of the people, who loved to fight their battles out rather than adjust their differences.

Mr. F. K. Munton, in a lecture delivered in London, on "bogus concerns," commenced by explaining what he meant by the term. Although the word "bogus" might sound unparliamentary, a little research had satisfied him that it was not inappropriate, as he found the origin of the term to be as follows:—Early in the present century a person named Borghese was convicted in America of a series of robberies founded on the issue of bills of exchange either in counterfeit names, or payable at imaginary banks, and the extraordinary success which attended these frauds before their exposure gave rise to the popular description of any counterfeit transaction as a "Borghese" one, the word being corrupted by easy transition to "borgus," and ultimately into "bogus."

The birthday honours conferred this year include that of Knight Bachelor to Chief Justice Strong, the newly appointed chief justice of the Supreme Court of Canada. The same honour has been conferred on Mr. John Madden, Chief Justice of the Supreme Court of the colony of Victoria, and on Mr. Henry Dias, ex-puissne judge of the Supreme Court of the Island of Ceylon. Four English solicitors have been knighted, one member of the bar gets a peerage, and another a baronetcy.

The Quebec Statutes of 1893, 56 Victoria, have been issued, and comprise 101 chapters, making a total of 419 pages. A good deal of space is occupied with consolidations of town charters. The city of Hull has a consolidation Act of 540 sections, covering 94 pages. The city of Ste. Cunégonde follows with an amendment Act of 47 sections, filling 17 pages. The town of Cote St. Antoine has a consolidation Act of 135 sections, occupying 25 pages. The town of Longueuil has an amendment Act which covers 45 pages. Among other Acts of interest are cap. 42, which requires an appeal from an interlocutory judgment to be first allowed by one of the judges of the Court, upon a summary petition; and chap. 38 reduces the number of juridical holidays.

COURT OF APPEAL ABSTRACT.

Compagnie projetée—Mandat—Responsabilité—Avocat.

*Jugé :—*Que des individus qui permettent que l'on se serve de leurs noms comme directeurs provisoires d'une compagnie projetée, aux fins d'obtenir du parlement un acte constituant cette compagnie en corporation, et qui signent les requêtes à cet effet, sont responsables du paiement des honoraires du procureur retenu par le promoteur de cette compagnie.—*Augé et al., & Cornellier et al.*, Montréal, Baby, Bossé, Blanchet et Hall, JJ., 26 novembre 1892.

Droit municipal—Appel.

Jugé :—Qu'il n'y a pas d'appel du jugement de la cour de circuit cassant une résolution d'un conseil municipal pour la nomination d'un conseiller.—*La Corporation de St. Mathias & Lussier*, Montréal, Lacoste, J. C., Baby, Bossé, Hall et Wurtele, JJ., 26 septembre 1892.

Expropriation—Just indemnity—Country residence.

Held: 1. Where part of a property occupied as a country residence is expropriated for railway purposes and its value as a country residence is thereby greatly diminished, the true test in estimating the indemnity to which the owner is entitled is, what was the commercial value of the property as an attractive country residence at the time of the expropriation, and what was the depreciation in the marketable value by reason of the expropriation of the strip of land by the railway company, and the intended working of its train service across it.

2. While the court has the right, under the Dominion Railway Act, to reconsider the evidence of value, and to vary the decision of the arbitrators or a majority of them, this power was intended only as a check upon possible fraud, accidental error, or gross incompetence, and should never be exercised unless in correction of an award which carries upon its face unmistakeable evidence of serious injustice.—*Canada Atlantic Railway Co. & Norris*, Montréal, Sir A. Lacoste, C. J., Baby, Bossé, Hall and Wurtele, JJ., December 23, 1892.

Expropriation—City of Montreal—Just indemnity—Costs of witnesses and advocates—Art. 407, C. C.

Held: That in expropriation proceedings under the charter of the city of Montreal, the production of witnesses and the retaining of counsel before the commissioners being a necessary proceeding by the expropriated party, the expenses of such witnesses and counsel form part of the just indemnity to which he is entitled under art. 407, C. C., and should be added by the commissioners to the price of the property taken.—*Sentenne et al. & La Cité de Montréal*, Montréal, Sir A. Lacoste, C. J., Baby, Bossé, Hall and Wurtele, JJ., February 28, 1893.

*Testament olographe—Mots écrits d'une main étrangère—Nullité—
Articles 850, 855 C.C.*

En 1875, une dame Metzler fit venir d'Ottawa un de ses neveux, le nommé John Jessie Reeves, qui demeura avec elle et en eut soin jusqu'à sa mort, arrivée en 1878. Avant cela, en 1868, Mme. Metzler avait fait un testament devant notaires en faveur du dit John Jessie Reeves et de deux autres de ses neveux. Après sa mort, J. J. Reeves produisit au greffe et fit prouver comme testament olographe de Mme. Metzler, un écrit sans date conçu textuellement en ces termes : " Je donne à mon neveu John J. J. Reeves tout ce que je possède pour avoir le soin de moi. (signé M. E. V. R. Metzler." Dans la déposition qu'il fit, aux fins de la vérification de ce testament, John Jessie Reeves affirma que tout cet écrit était de l'écriture de la testatrice. Il fut cependant prouvé que les mots " John J. Reeves " avaient été ajoutés par une main étrangère, mais tout le reste du testament était de l'écriture de Mme. Metzler.

Jugé : (infirmant le jugement de la cour de première instance, Baby et Bossé, JJ., *dissentientibus*), que le testament olographe en question n'étant pas en entier de l'écriture de la testatrice, les mots " John J. Reeves " ayant été ajoutés par une main étrangère, le dit testament était nul, et que le testament devant notaires de 1868 seul était en vigueur.—*Reeves & Cameron et vir*, Montréal, Lacoste, J. C., Baby, Bossé, Blanchet et Wurtele, JJ., 25 mars 1893.

ABSTRACT OF CROWN CASES.

Commitment—Erreur—Vagabondage—" Night-walker."

Jugé :—1. Qu'il est permis de corriger une erreur dans une commitment,—dans l'espèce, l'absence de date,—par la production d'une copie régulière.

2. Qu'une offense décrite comme suit : " of being a loose, idle or " disorderly person or a vagrant within the meaning of the " statute, for that she, on the 23rd day of March instant, at the " said city, being a night-walker, did unlawfully wander by night " between ten and eleven in the evening, in a public street of the " said city, St Dominique street, and did not then and there " render a satisfactory account of herself when required to do so " by the constable Paul Hill, contrary to the statute in such case

"made and provided," satisfait aux exigences de la loi.—*Ex parte Gagnon*, Assises criminelles, Montréal, Hall et Wurtele, JJ., mars 1893.

Jury du Coroner—Plaidoyer d'autrefois acquit.

Jugé :—Que le fait que le jury du coroner a rapporté un verdict de mort accidentelle dans l'affaire du prisonnier ne justifie pas un plaidoyer d'autrefois acquit de la part de ce dernier.—*La Reine v. Regis Labelle*, Assises Criminelles, Montréal, Sir A. Lacoste, J. C., juin 1892.

Tribunal étranger—Juridiction—Juge en chambre.

Jugé :—Qu'un juge en chambre ne peut réviser, sur une requête pour bref d'habeas corpus, la décision d'un tribunal étranger.—*Ex parte Lambert*, requérant, Montréal, Hall et Wurtele, JJ., en chambre, 7 avril 1893.

Droit criminel—Tentative d'assaut.

Jugé :—Qu'un verdict de tentative d'assaut n'a rien d'irrégulier.—*Leblanc v. La Reine*, Montréal, Sir A. Lacoste, J. C., Bossé, Blanchet et Hall, JJ., décembre 1892.

SUPERIOR COURT ABSTRACT.

Procédure—Inscription en révision par le représentant de la partie décédée—Reprise d'instance—Partage—Art. 746, C. C.

Jugé : Que le représentant de la partie décédée a le droit d'inscrire en révision sans au préalable reprendre l'instance.

Que la vente par un co-propriétaire par indivis, à son co-propriétaire, de sa part indivise n'a pas les effets du partage, et que partant l'hypothèque consentie par le vendeur continue de grever la part vendue, malgré cette vente.—*Varin v. Guérin*, C. R., Montréal, Jetté, Davidson et Pagnuelo, JJ., 31 janvier 1893.

Procédure—Preuve—Affaire commerciale—Témoignage de la partie—Art. 251, C. P. C.

Jugé : 1. Qu'un billet promissoire donné par un cultivateur à un autre cultivateur, pour argent prêté, n'est pas une affaire commerciale, et que la partie ne peut pas être témoin pour elle-même.

2. Que la preuve du paiement faite par les deux défendeurs comme témoins l'un pour l'autre, est insuffisante si elle n'est corroborée par une preuve étrangère.—*Hamilton v. Perry*, C. S., Montréal, Pagnuelo, J., 2 février 1893.

Capias—Personal indebtedness.

Held: Where the action is by a partner praying for the dissolution of the partnership and for the rendering of an account, the personal indebtedness in a sum amounting to or exceeding \$40, which must be alleged in the affidavit for *capias*, cannot be considered to exist until such account has been rendered and accepted or settled.—*Phillips v. Kerr*, S. C., Montreal, Wurtele, J., April 2, 1892.

Necessary deposit—Keeper of boarding-house—Negligence.

Held: The keeper of a boarding-house who neglects to provide a lodger with a key to lock the room assigned to him is responsible for the value of effects stolen therefrom.—*Falconer v. Pater-son*, S. C., Montreal, Tait, J., April 29, 1892.

Contract—Sale—Non-performance—Damages.

Held: 1. Where a person has obtained a promise of sale of real estate, and, relying on that promise, has resold the property, he is entitled to recover from the vendor, by way of damages, the profit he would have derived from the resale, if the vendor refuses without valid grounds to execute a deed of sale to him.

2. Where the purchaser of real estate was to make a cash payment by accepted cheque, the fact that he did not at first appear at the office of the notary with the cheque accepted, but got it accepted by the bank the same day, was not a valid ground for the seller's refusal to complete the sale.—*Newman v. Kennedy*, S. C., Montreal, Gill, J., January 18, 1892.

Droit ecclésiastique—Curé—Avis d'action—Refus des sacrements—Supplément à la dîme—Jurisdiction—Enregistrement des baptêmes—Art. 22, C. P. C.

Jugé: Que le curé, poursuivi pour avoir refusé de baptiser l'enfant du demandeur, n'a pas droit à un avis d'action aux termes de l'article 22 du C. P. C.

Qu'un demandeur qui attache son honneur à la participation aux sacrements, doit remplir les conditions imposées par les lois et ordonnances dont il invoque le bénéfice. (Il s'agissait dans l'espèce d'un supplément imposé par ordonnance épiscopale.)

Que si l'administration des sacrements est du ressort de l'autorité ecclésiastique, la participation aux sacrements est un droit qui appartient à tous les membres de la communion catholique et qui ne peut être soumis, dans son exercice, à des conditions ou à des exigences arbitraires; que lorsqu'il n'y a que le refus de sacrement, sans accompagnement d'injure articulée et personnelle, il n'y a lieu qu'à l'appel simple devant l'autorité ecclésiastique compétente, dans l'ordre de la conscience et selon les règles et l'application des canons, et que le pouvoir temporel ne devient compétent qu'autant que des injures, des outrages, l'oppression, le scandale se joignent à ce refus, lui donnent un caractère qu'il n'a pas par lui-même et font éprouver des dommages dans les biens et les droits civils.

Que les curés, prêtres ou ministres desservant les églises, congrégations ou sociétés religieuses autorisées à tenir les registres de l'état civil, ne sont tenus que d'enregistrer les baptêmes, etc., faits par eux, et qu'ils ne sont pas obligés d'enregistrer la naissance des enfants dont ils ne font pas le baptême.—*Davignon v. Rev. Messire C. Lesage*, C. S., Montréal, Tellier, J., 7 janvier 1893.

Procédure—Inscription de faux—Changement du jour du retour d'un bref—Femme mariée autorisée par le juge—Désignation de la demanderesse—Art. 49 C. P. C.

Jugé : 1. Qu'il faut une inscription de faux pour pouvoir démontrer au tribunal que le bref d'assignation a été altéré ou falsifié après son émanation.

2. Que le jour du retour de bref peut être changé, avant signification, soit par le protonotaire lui-même, soit avec son assentiment.

3. Que la femme mariée, autorisée par un juge à ester en justice, au refus de son mari de l'autoriser, n'est pas tenu, aux termes de l'article 49 C. P. C., de mentionner dans le bref d'assignation la qualité ou l'occupation de son mari, lequel n'est pas en cause.—*Vendette v. Bolduc dit Germain*, C. S., Montréal, Taschereau, J., 31 janvier 1893.

Droit municipal—Résolution et règlement—Avis—Arts. 460, 475, 489, 490, 493, 498, C. M.

Jugé: 1. Qu'un conseil local peut statuer la construction d'un canal d'assainissement par résolution aussi bien que par règlement, mais que son entretien et la taxation voulue pour en défrayer le coût doivent être déterminés par règlement.

2. Qu'un règlement peut être considéré comme non avenu en ce qui concerne la construction de travaux déjà ordonnés par l'autorité compétente, et maintenu quant à la taxe qu'il impose pour en payer le coût.

3. Que nul avis préalable à l'adoption d'un tel règlement n'est requis, mais qu'il suffit que ce règlement soit publié en la manière voulue par l'article 693 C. M.—*Archambault v. La Corporation de St. François d'Assise de la Longue Pointe*, C. C., Montréal, Loran-ger, J., 16 janvier 1893.

Voiturier—Paiement des frais de voiturage—Droit de rétention—Art. 1679, C. C.

Jugé: Que le voiturier ne peut réclamer ses frais de voiturage avant la livraison de tous les effets qu'il s'est engagé de transporter.

Que lorsque le voiturier a demandé ses frais de transport avant d'avoir complété le voiturage des effets en question et qu'il n'a pas renouvelé cette demande depuis, en offrant délivrer ces effets, il ne peut opposer son droit de rétention à la saisie-revendication du propriétaire des effets.—*Stout v. King*, S. C., Montréal, Loran-ger, J., 7 février 1893.

Sauvetage—Action par propriétaire seul—Exception à la forme.

Jugé: —Le propriétaire du vaisseau qui a opéré le sauvetage ne peut poursuivre en son nom seul que pour la part du dit sauvetage qui lui serait due, et s'il n'allègue pas en quoi consiste cette part, et ne fait pas connaître les noms et domiciles des autres intéressés, savoir le capitaine et l'équipage, son action sera renvoyée sur exception à la forme.—*Chabot v. Quebec Steamship Co.*, C. S., Québec, Routhier, J., 30 décembre 1892.

Vente—Clause de franc et quitte—Preuve testimoniale.

Jugé:—Qu'il incombe au vendeur sous la clause de " franc et quitte," qui réclame la balance du prix de vente, de faire voir qu'une hypothèque qui paraît exister contre l'immeuble vendu a été réellement radiée, et qu'il ne remplit pas son obligation en produisant une quittance enregistrée qui mentionne erronément une autre obligation et ne décharge pas l'immeuble en question.

Que dans ces circonstances le vendeur doit lui-même faire radier l'inscription avant d'exiger la balance du prix de vente.

Que la preuve testimoniale n'est pas admissible pour démontrer que malgré l'énonciation erronée qu'elle renfermait, la quittance produite s'applique réellement à la créance hypothécaire dont l'acheteur se plaint.—*Les curé et marguilliers de l'œuvre et fabrique de Notre-Dame de Montréal v. Monarque et uxor*, C. S., Montréal, Taschereau, J., 17 novembre 1892.

Demande incidente—Dépôt pour la révision—Frais—Arts. 151, 497 C. P. C.

Jugé: Que lorsque le défendeur a fait une demande incidente qui découle de la même cause d'action que la demande principale, il n'y a lieu de faire qu'un seul dépôt en révision, bien que l'inscription demande la révision du jugement rendu sur la demande principale et la demande incidente.—*Mackay v. Evans*, S. C., Montréal, Davidson, J., 31 janvier 1893.

Mari et femme—Requête pour aliments—Recours au civil et au criminel—Mauvaise conduite de la requérante—Réponse en droit.

Jugé:—Que le fait que la femme poursuivi en séparation de corps, qui demande, pendant l'instance, une pension alimentaire à son mari, a déjà poursuivi ce dernier devant la cour criminelle pour refus de pourvoir à ses besoins, ne la prive pas du droit de demander une pension alimentaire devant le tribunal civil.

Que des allégations de mauvaise conduite de la part de la requérante ne sont pas une réponse à une requête pour aliments, surtout lorsque la femme demande cette pension alimentaire tant pour elle que pour l'enfant né de son mariage avec le défendeur.—*Nunensynski v. Pilnik*, C. S., Montréal, Loranger, J., 8 février 1893.

*Procédure—Exception à la forme—Désignation du demandeur—
Art. 49 C. P. C.*

Jugé :—Qu'un demandeur qui se désigne comme "gentilhomme" au bref de sommation, se donne une qualité suffisante au désir de la loi.—*Stevens v. Higgins*, Loranger, J., C. S., Montréal, 8 février 1893.

*Imbécilité—Démence—Exception à la forme—C. P. C. 116—
C. C. 327, 987.*

Jugé :—Une exception à la forme à une action prise par une personne internée dans un asile d'aliénés, mais non-interdite, ne doit pas être renvoyée sur réponse en droit, mais doit être considérée comme une mise en demeure de la demanderesse de se faire assister d'un curateur.—*Mercier v. Mercier*, C. S., Québec, Routhier, J., 5 mars 1892.

Attachment by garnishment—C. C. P. 555, 614.

Held :—The writ of *saisie-arrêt* constitutes a new instance, and ought to be definite and complete in itself when issued.

Article 614, C. C. P., which provides that the writ must mention the amount of the judgment for the satisfaction of which it issues, is to be construed as meaning the amount remaining unsatisfied on such judgment.

Article 555 applies to the writ of *fieri facias*, and not to that of *saisie-arrêt*, between which writs there is an essential difference.—*Vezina v. Tousignant, & Paris*, T. S., S. C., Quebec, Routhier, Caron, Andrews, JJ., Feb. 28, 1893.

Obligation à terme—Action before expiry of term, for alleged diminution of security—C. C. 1092—J. N. 1188.

Held :—The provisions of article 1092, C. C., which deprive the debtor of the benefit of delay in certain cases, are to be strictly construed, and a creditor seeking to enforce payment of a debt before maturity must formulate clearly and distinctly in his declaration the reasons upon which he bases his demand.

As long as a debtor is not insolvent he has an absolute right to administer his estate and dispose of his assets, provided he does so prudently and without fraud, and article 1092 has no application to such administration; the security of which that article

forbids the diminution, meaning only securities specially given under contract.

The maturity of a note during the pendency of an action prematurely brought upon it, is no answer to the exception of the defendant that such note was not payable at the moment of the institution of the action.—*Wark v. Perron*, S. C., Quebec, Routhier, Caron, Andrews, JJ., Feb. 28, 1893.

Lessor and lessee—Damage by fire to premises leased—Dissolution of lease—Arts. 1634, 1660, C. C.

Premises leased for manufacturing purposes were partially injured by a fire. The lessee visited the premises daily during two or three weeks while repairs were in progress, and the repairs were fully completed about a month after the fire. The lessee did not protest for rescission of the lease until fourteen days after the fire. *Held*, under these circumstances, that the lessee was not entitled to obtain the dissolution of the lease, especially as the legal presumption was that the fire was due to the carelessness of his watchman.—*Pinsonneault v. Hood et al.*, S. C., Montreal, Davidson, J., December 9, 1892.

Procedure—Incidental demand—Action pro socio—Arts. 18, 149, C. C. P.

Held:—In an action *pro socio* to account, an incidental demand by which the plaintiff claims damages for unfounded legal proceedings which, previous to the present suit, had been instituted by his partner to obtain the liquidation of the partnership business, will be dismissed on demurrer, such demand not being founded on a right accrued since the service of the principal suit nor connected with the right claimed by such suit, and not coming within the terms of Arts. 18, 149, C. C. P.—*Gerhardt v. Davis et al.*, S. C., Montreal, Tait, J., April 2, 1892. (1)

Suretyship—Appeal bond—Novation—Chose jugée—Debt of succession.

Held:—1. Where one of the sureties on an appeal bond became insolvent, and respondent's attorneys accepted \$200 "pour valoir comme cautionnement en appel, et en tenir lieu d'une caution de l'insolvabilité d'une des cautions," that this did not operate a novation of the suretyship, but the same remained binding and effective.

(1) This decision has been since reversed in appeal.

2. A condemnation obtained against one of two co-sureties is *chose jugée* as regards the other surety and his representatives.—*Truteau v. Fahey et vir*, S. C., Montreal, Davidson, J., June 27, 1892.

Procedure—Execution—Seizure of movables—Sale suspended by opposition—Art. 578, C. C. P.

Held :—Where the seizure of movables by the first seizing creditor is suspended by reason of an opposition to his proceeding; the next seizing creditor is not thereby prevented from proceeding to the sale of the effects, the preference given to the first seizing creditor only subsisting so long as he is in a position to proceed to the sale of the effects seized and is not retarded by oppositions not affecting other creditors in a position to proceed.—*Joseph v. Leblanc, & Marcotte*, mis-en-causo, and Brown, opposant, S. C., Montreal, Doherty, J., June 24, 1892.

Servitudes—Division wall—Replacement of—Arts. 518, 519, C. C.

Held :—Where a gable wall on the dividing line between two properties is not *mitoyen*, the owner of the adjoining property has the right to convert it into a *mitoyen* wall only after complying with the requirements of Arts. 518 and 519, C. C. Even where the wall in question is not straight nor adapted for a common wall, the neighbour is not entitled, without the consent of the owner or process of law, to take possession thereof and demolish it, with a view to rebuilding it as a common wall.—*Bruchési v. Desjardins*, S. C., Montreal, Doherty J., March 10, 1892.

Charte de la cité de Montréal—Vente d'un immeuble grevé de substitution—Nullité de décret.

Jugé : Que le décret d'un immeuble, à la poursuite de la cité de Montréal, en vertu des dispositions de sa charte et en recouvrement de taxes, ne purge pas les substitutions non ouvertes qui grevent cet immeuble, et que l'adjudicataire d'un tel immeuble peut se pourvoir en nullité de décret.—*Chaput v. La cité de Montréal, & Guenette et al.*, C. S., Montréal, Jetté, J., 30 novembre 1892.

Exécuteur testamentaire—Insaisissabilité—Consignation.

Jugé: 1. Qu'un exécuteur testamentaire qui a été poursuivi par un héritier en destitution de sa charge, et qui a fait débouter l'action de cet héritier avec dépens, peut charger à ce dernier, le montant des frais qu'il a ainsi payés, malgré que les revenus légués à cet héritier soient, par le testament, déclarés insaisissables.

2. Qu'un demandeur est non recevable à se plaindre de l'irrégularité d'une consignation faite par le défendeur lorsqu'il a touché le montant ainsi consigné.—*Quintal et vir v. Roberge*, C. S., Montréal, de Lorimier, J., 30 novembre 1892.

GENERAL NOTES.

DIVORCE IN FRANCE.—During the last five years about 30,000 couples have availed themselves of the French divorce law. The Chamber has just now read for the first time (says the Paris correspondent of the *Daily Telegraph*) a law tending to make a severance of the matrimonial bonds as easy as buying a ticket for the opera. According to the new bill, a mere judicial separation of the spouses can be changed to definite divorce after the lapse of three years, on the demand of either of the parties—plaintiff or respondent.

AN OLD CASE.—The memory of *Jarndyce v. Jarndyce* and the actuality of *Concha v. Concha* have been eclipsed by a still more protracted litigation. Recently a petition was presented to Mr. Justice Chitty in the case of *Greenhill v. Chauncey* for the payment out of certain shares in the accumulation of a sum of money which was paid into Court under the order of the old Court of Chancery in 1747. The original Greenhill and Chauncey appear to have been partners in the Temple Mills Brass Works, and there were also other persons interested in the firm. Squabbles took place over their respective shares in the business, and some time before 1747 they went to the Court of Chancery for a settlement of the dispute, little dreaming that '*Greenhill v. Chauncey*' would still figure in the Court list towards the end of the 19th century. In the course of the litigation a sum of £1,221 12s. 7d. was paid into Court and invested in South Sea Annuities. That sum has grown to the considerable figure of £14,243 6s. 2d., and is now claimed by the legal personal representatives of certain of the original partners in the Temple Mills Brass Works, on whose behalf the petition was presented. Mr. Justice Chitty intimated that 'Government duties' would absorb a large part of

the £14,000, that the claimants would have to prove their title at their own expense, and that it was doubtful what they would receive.

DIPLOMATIC IMMUNITIES.—The suite of ambassadors seem in some cases to presume unduly on the hospitable reception accorded to the principals in this country. On June 3 a magistrate was obliged to refuse a bastardy summons on the ground that the person alleged to be the putative father was a valet to the Japanese Minister, and, as such, entitled to the benefit of the Diplomatic Privileges Act, 1708 (7 Anne c. 12). Mr. Heard, in his 'Curiosities of Legal Reporting' (Boston, Mass., 1881), records a somewhat different result to a similar application. In 1768 a woman appeared before justices to swear a child on the secretary to Count Bruhl, the Saxon Minister, but the Court interfered and the justices were afraid to proceed. The woman applied to Sir Fletcher Norton (soon afterwards Attorney-General), who advised application for a peremptory *mandamus* to proceed with the affiliation. Lord Mansfield suggested application to the Attorney-General or the Foreign Minister for redress; whereupon Sir Fletcher Norton bearded the great judge and asserted his client's right as a subject to apply to the Court. Two of the judges were in favour of the grant of the motion; but we cannot trace the case further. So far as it goes, it is against the diplomatic immunity of a putative father. We would suggest that it is doubtful whether the Act of Anne was intended to do more than protect diplomatists and their suite from arrest on *mesne* process in civil proceedings. But in practice, undoubtedly, they are excused from liability to any process or taxation. Cabmen who are bilked by *attachés* cannot get a summons, and a *soi-disant* diplomatist some years since successfully claimed immunity in answer to an offence against the Hyde Park regulations, while the coroners have twice been foiled in attempts to hold inquests, once on a Chinese baby, and in the other case on a member of the Chinese Embassy who killed himself outside its curtilage. In the last two cases no doubt the English law might have taken a barbarous view of Celestial ethics; but in the preceding cases there seemed no violation of national independence in requiring a cab to be paid for or police regulations to be observed. We should not nowadays allow the retinue of the French and Spanish ambassadors (as Charles II. did) to have a pitched battle in the London streets for precedence of audience (*Pepys*, September 30, 1661).—*Law Journal* (London).

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CURRENT TOPICS AND CASES.

The Supreme Court of Alabama, in the case of *Arp v. The State*, Jan. 26, 1893, maintained a ruling of the court below which refused to charge that homicide, under threats of immediate peril to the prisoner's own life, was justifiable. Arp's defence was that two persons threatened to kill him unless he killed the deceased, and that it was through fear and to save his own life he struck deceased with an axe. The Alabama Supreme Court followed the principle laid down by the English Court of Queen's Bench in *Reg. v. Dudley*, L.R., 14 Q.B. Div. 273, 560. An abridged report of the United States decision will appear in a future issue.

A third edition of Mr. Justice Taschereau's work on the criminal statute law of Canada is now in press, and will appear shortly. This edition has been necessitated by the enactment of the Criminal Code, which is in force from July 1st, 1893, and the work will appear under the title of "The Criminal Code of the Dominion of Canada." The volume will contain, besides the text of the Code, under each section to which they severally apply: (1) The report of the Imperial commissioners on the draft code of 1879, submitted to the Imperial House of Commons in the form of a bill in 1880; (2) English and Canadian decisions to date; (3) References to the corresponding

Imperial statutes in force in England; (4) References to unrevoked English statutes applying to Canada; (5) Citations from English text-books; (6) Forms of indictments; (7) Changes, extensions and additions to the law made by the new criminal code.

A recent decision by the English Queen's Bench Division (June 7), in *Bowyer v. The Percy Supper Club*, will oblige proprietary clubs in England to apply for licenses to sell liquors. The company in this case was incorporated under the Companies Acts, and carried on the business of a proprietary club for its own profit. There was the usual book of rules, and on the first page was a memorandum to the effect that, the club being proprietary, neither members nor committee incurred any liability whatever beyond their annual subscription. The company did not hold any license authorizing them to sell any kind of alcoholic liquor. On a prosecution for selling spirits, etc., by retail without a license, the magistrate found that the club was a *bona fide* club, and carried on for the profit of the company, and that the profit from the sale went to the company. The magistrate refused to convict on the ground that the supplying of alcoholic liquor to a member of a genuine proprietary club was not a sale within the meaning of the Excise Acts. The Court (Mathew and Wright, JJ.) held on the facts proved that the supplying the alcoholic drink clearly amounted to a sale within the meaning of the Licensing Acts. The liquor belonged to the company, and the members of the club had no interest in it. It might be that a proprietary club could be so carried on as to give the members a proprietary interest in the alcoholic liquor of the club; and in such a case the supplying them with liquor might not amount to a sale within the meaning of the Licensing Acts. That was not so here. The case was sent back to the magistrate with an intimation that in the opinion of the Court the facts proved constituted a sale within the meaning of the Licensing Acts.

SUPREME COURT OF CANADA.

OTTAWA, May 1, 1893.

WILLIAMS v. IRVINE.

Quebec.]

Right of appeal—54 and 55 Vic., ch. 25—Construction of.

By sec. 3, ch. 25 of 54-55 Vict., an appeal is given to the Supreme Court of Canada from the judgment of the Superior Court in review (P. Q.), "where, and so long as no appeal lies from the judgment of that court, when it confirms the judgment rendered in the court appealed from, which by the law of the province of Quebec is appealable to the judicial committee of the privy council."

The judgment in this case was delivered by the superior court on the 17th November, 1891, and was affirmed unanimously by the superior court in review on the 29th July, 1892, which latter judgment was, by the law of the province of Quebec, appealable to the judicial committee. The statute 54 and 55 Vic., ch. 25, was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the superior court in the month of June, 1891, prior to the passing of 54 and 55 Vic., ch. 25. On an appeal from the judgment of the superior court in review to the supreme court of Canada, the respondent moved to quash the appeal for want of jurisdiction.

Held, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 and 55 Vic., ch. 25, does not extend to cases standing for judgment in the superior court prior to the passing of the said act. *Couture v. Bouchard* followed; [21 S.C.R. 281.] Taschereau & Gwynne, JJ., dissenting.

Fournier, J.—That the statute is not applicable to cases already instituted or pending before the courts, no special words to that effect being used.

Appeal quashed with costs.

H. Abbott, Q.C., for appellant.*St. Jean* for respondent.

BROWN v. LECLERC.

Quebec.]

*Loading of steamer—Accident—Neglect of usual precaution—
Liability of employer.*

Where two stevedores are independently engaged in loading the same steamer, and, owing to the negligence of the employees of the one, an employee of the other is injured. the former stevedore is liable in damages for such injury. The failure to observe a precaution usually taken in and about such work is evidence of negligence. Gwynne, J., dissenting.

Appeal from judgment of Q. B., Montreal (1 B. R. 234) dismissed with costs.

Geoffrion, Q. C., for appellant.

Bonin, Q. C., for respondent.

MARTINDALE v. POWERS.

Quebec.]

Quality of plaintiff—General denegation—Art. 144, C. C. P.—Don mutuel—Property excluded, but acquired after marriage.

Held, 1. Affirming the judgment of the court of Q. B., Montreal (1 B. R. 144), the quality assumed by the plaintiff in the writ and declaration is considered admitted, unless it be specially denied by the defendant. A *défense au fond en fait* is not a special denial within the meaning of art. 144, C. C. P.

2. Where by the terms of a *don mutuel* by marriage contract, a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father, the deed of donation having been resiliated for value, it was held that by reason of the resiliation the husband had acquired an independent title to the farm, and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz: \$5,000, and that after the husband's death the wife (the respondent in this case) was entitled, until a proper inventory had been made of the deceased's estate, to retain possession of the farm. Taschereau & Gwynne, JJ., dissenting.

Appeal dismissed with costs.

Racicot, Q. C., and *Amyrauld* for appellant.

Baker, Q. C., for respondent.

STEPHENS V. GORDON.

Ontario.]

Agreement, Construction of—Way—Timber—Removal of.

The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land, under an agreement, which provided among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land, "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed would have involved an expenditure which would have probably amounted to a sacrifice of the greater portion of the timber.

Held, affirming the judgment of the court below, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right under the general grant of the trees, to remove the trees across the cleared land. Gwynne, J., dissenting.

Appeal dismissed with costs.

M. Wilson, Q.C., for appellant.*D. McCarthy, Q.C.*, for respondent.

CORBETT V. SMITH.

Nova Scotia.]

Deed—Action to set aside—Undue influence—Evidence.

C., executrix under a will, brought an action to have a deed executed by testator some two months before the date of the will, set aside and cancelled for undue influence by the grantees, and incompetence of the grantor to execute it. C. alleged in her statement of claim that testator was eighty years old and a man of childlike simplicity; that defendants, grantees under the deed, had kept him under their control and several times assaulted him when he wished to leave their house; and that he

had requested C. to live with him and take care of him until he died, which defendants would not permit her to do. The deed in question purported to be in consideration of grantees paying testator's debts and maintaining him for the rest of his life.

Held, affirming the decision of the supreme court of Nova Scotia, that the evidence showed that the deed was given for valuable consideration, and that undue influence was not established. C., therefore, could not maintain her action.

Appeal dismissed with costs.

King, Q.C., for appellant.

Russell, Q.C., for respondents.

CITY OF TORONTO v. GILLESPIE.

Ontario.]

*Municipal corporation—Local improvement—Notice to rate-payers—
By-law—Variance from notice.*

The corporation of Toronto, wishing to construct, as a local improvement, a stone roadway on one of the streets of the city, gave notice to the owners of the properties thereby, as required by s. 622 (2) of the Municipal Act, of such intended improvement, in which notice the proposed work was the construction of a "macadam roadway" on Bloor street, etc., and the payment of the cost was to be made by special assessment on the properties benefited, payable "in five and twenty" equal payments. By the by-law passed for its construction the work was described as "a macadam and granite set roadway and stone curbing," and the cost was to be paid in five years. On an application to quash the by-law it was not shown that the work as described in the by-law was identical with that mentioned in the notice.

Held, affirming the decision of the court of appeal (19 Ont. App. R. 713), that the by-law was invalid on account of the said variances from the notice, and it was properly quashed.

Appeal dismissed with costs.

Biggar, Q.C., for appellants.

Aylesworth, Q.C., for respondent.

DAVIES v. McMILLAN.

British Columbia.]

*Sheriff—Action against—Trespass—Sale of goods by insolvent—
Intent—Bona fides—Judgment on interpleader issue—Estoppel.*

K., a trader in insolvent circumstances, sold all his stock in

trade to D. who knew that two of K.'s creditors had recovered judgment against him. The goods so sold were afterwards seized by the sheriff under executions issued on judgments recovered after the sale. On a trial of an interpleader issue in the county court the jury found that K. had sold the goods with intent to prefer the creditors who then had judgments, but that D. did not know of such intent. The county court judge gave judgment against D., holding that the goods seized were not his goods, and that judgment was affirmed by the court in banc. D. afterwards brought an action against the sheriff for trespass in seizing the goods, and obtained a verdict which was set aside by the court in banc, the majority of the judges holding that the county court judgment was a complete bar to the action. On appeal to the supreme court of Canada :

Held, reversing the decision of the supreme court of British Columbia, that the evidence showed that D. purchased the goods from K. in good faith for his own benefit, and the statute against fraudulent preferences did not make the sale void.

Held, also, that the county court judgment, being a decision of an inferior court of limited jurisdiction, could not operate as a bar in respect of a cause of action in the supreme court, and beyond the jurisdiction of the county court to entertain.

Held, further, that if such judgment could be set up as a bar it should have been specially pleaded by way of estoppel, in which plea all the facts necessary to constitute the estoppel must have been set out in detail, and from the evidence in the case no such estoppel could have been established.

Appeal allowed with costs.

Moss, Q.C., for appellant.

Robinson, Q.C., for respondent.

COURT OF APPEAL ABSTRACT.

*Corporation municipale—Chemin public—Expropriation—
Action possessoire—Injonction.*

Jugé :—1. Une corporation municipale ne peut pas prendre possession, en vertu de ses règlements ou procès-verbaux, du terrain nécessaire à l'ouverture d'un chemin, lors même que ce serait le premier chemin de front sur un lot dont la concession contient une réserve de terrain à cette fin, sans, au préalable, accomplir les

formalités exigées pour l'expropriation pour les fins municipales. (C. M. art. 902 *et seq.*)

2. Le propriétaire du terrain peut, en pareil cas, recourir à l'action en complainte et à l'injonction, pour faire cesser le trouble dans sa possession, et discontinuer les travaux.—*King et al. & La Corporation de la partie nord du township d'Irlande*, Québec, Lacoste, J.C., Baby, Bossé, Hall et Wurtele, JJ., 10 janvier 1893.

Possession—Action en complainte—Estacades—Art. 5551, S. R. Q.

Jugé :—Celui qui relie une estacade (*boom*), sur une rivière flottable, à un arbre et à un poteau par lui planté sur la rive, dans le terrain d'autrui, et sans nécessité de le faire pour sauver son bois flotté, mais seulement pour l'y retenir, apporte un trouble à la possession du propriétaire riverain et est passible d'une action en complainte de la part de ce dernier, à l'encontre de laquelle il ne saurait tirer une défense des dispositions de l'art. 5551, S. R. Q.—*La Compagnie de Pulpe des Laurentides & Clément*, Québec, Lacoste, J.C., Baby, Bossé, Hall et Wurtele, JJ., 10 janvier 1893.

Powers of court—Questions not submitted in appeal.

Held :—The court will not consider a law issue raised by demurrer in the court below, and disposed of there by interlocutory judgment, when no reference is made to it in appeal on the merits, and when it does not show absence of jurisdiction or of right of action.—*Larue & Kinghorn*, Quebec, Lacoste, C.J., Blanchet, Hall and Wurtele, JJ., April 4, 1893.

Interprétation de contrat.

La compagnie "The Quebec Central Railway Co.," intimée, se trouvant en difficultés financières, il fut convenu, par acte daté du 2 avril 1887, entre les directeurs provisoires de cette compagnie, désignés par un acte de la législature qui remettait le contrôle de la compagnie entre les mains des porteurs de débentures d'une part, et l'appelant, de l'autre, que l'appelant, qui contrôlait le fonds capital de cette compagnie, dont il était le président, en considération du transport devant lui être fait de débentures représentant la somme de \$250,000, paierait toutes les dettes énumérées dans une cédule annexée à l'acte, sauf certaines dettes expressément exceptées, de manière à ce que la nouvelle administration put obtenir le contrôle de cette compagnie, libérée de

toutes dettes, sauf celles exceptées ; que les dites débentures seraient déposées entre les mains d'un fidéi-commissaire, lequel les transférerait à l'appelant à mesure que ce dernier justifierait de ses paiements. La cédula susdite énumérait, dans une première partie, les dettes de la compagnie, et dans une seconde partie, les dettes des constructeurs du chemin.

Jugé :—(Infirmant la décision de la cour supérieure, Brooks, J., 14 L. N., p. 354) : Que l'appelant avait le droit en vertu du contrat susdit, d'employer les revenus de la compagnie accrus avant la date de ce contrat, à acquitter les anciennes dettes de la compagnie, et que la somme ainsi employée ne devait pas être déduite de sa réclamation pour la remise des débentures en question.—*Robertson & The Quebec Central Railway Co.*, Montreal, Lacoste, J.C., Bossé, Blanchet, Wurtele, JJ., 26 avril 1893.

SUPERIOR COURT ABSTRACT.

Sale à terme—Unpaid Vendor—Saisie-conservatoire—C.C., 1998, 2000.

Defendant purchased from plaintiff a cargo of coals, to be settled for by his promissory note at three months, deliverable to plaintiff on the unloading of the cargo on the wharf, but failed to give or offer such note, and in spite of diligent search it could not be found, whereupon plaintiff took a *saisie-conservatoire*, and seized the coals, without, however, alleging sequestration, absconding or insolvency on the part of defendant, or asking the rescission of the sale.

Held :— Dismissing petition to quash, that defendant's default to give such note entitled plaintiff to demand immediate payment in cash, and at the moment of resorting to his seizure he was in the position of an unpaid vendor for cash, having the right to protect his privilege by *saisie-conservatoire*.—*Maguire v. Baile*, C. R., Quebec, Routhier, Caron, Andrews, JJ., March 30, 1893.

Joint Stock Company—Companies' Act, 1862-83 (Imperial)—Winding-up Act—Liquidator, status of, before Canadian Courts—Intervention—Deposit—Saisie-arrest.

Held :—Where Canadian creditors of a joint stock company incorporated under the (Imperial) Companies' Act, 1862-83, are proceeding to execute a judgment obtained in the courts of this province upon assets of the company situated within the pro-

vince, a liquidator named in Great Britain to the voluntary winding up of such company cannot intervene and demand that the company's assets be removed to Great Britain, to be there by him distributed in accordance with the provisions of the said Companies' Act. *Quere*, has such liquidator any standing before the Courts of this province?—*Quebec Bank v. Bryant et al., & Hall et al.*, T.S., S.C., Quebec, Andrews, J., April 15, 1893.

Election—Note given for money lent candidate not recoverable—
R. S. Q., 425.

Held:—A promissory note given by a candidate, for money loaned him during an election of a member of the legislature, the lender knowing that the money was obtained and destined for use by the borrower in such election, is not recoverable at law, in virtue of the provisions of Art. 425, R. S. Q., as being a promise and contract arising out of an election.—*Ritchie v. Vallée*, C.R., Quebec, Casault, Caron, Andrews, J.J., March 30, 1893.

Salvage—Action by owner alone—Dilatory exception.

Held:—The action accruing to the owner, master, and crew of a salving vessel is indivisible, and a suit brought by the owner alone will be stayed on dilatory exception until the master and crew have been made parties to the suit.—*Chabot v. Quebec Steamship Co.*, S. C., Quebec, Routhier, J., April 4, 1893.

Procédure—Plaidoyer—C. P. C. 138.

Jugé:—1. Un plaidoyer alléguant que le demandeur a été membre d'une administration qui a commis des actes de corruption et de mauvaise administration, est suffisamment libellé, même s'il ne donne aucun détail de ces actes, et se contente de référer à une volumineuse enquête produite avec ce plaidoyer;

2. Une motion qui demande de faire rayer d'un plaidoyer certaines allégations, parce qu'elles ne sont pas suffisamment libellées, doit être faite dans les quatre jours de la production de tel plaidoyer, conformément à l'art. 138 C. P. C.;

3. La cour peut d'office, et même lorsque ce moyen n'a pas été invoqué par la partie adverse, se prévaloir de ce que telle motion n'a pas été faite ainsi dans les quatre jours après la production du plaidoyer.—*Langelier v. Casgrain*, C. S., Québec, Casault, J., 15 avril 1893.

LIABILITY OF A SLEEPING CAR COMPANY FOR LOSS OF BAGGAGE.

An examination of the cases relating to the obligations and liabilities of sleeping car companies for loss of goods and baggage of passengers will show a great diversity of opinion and that no uniform rule has yet been agreed upon. This is not surprising when we consider that the service is of so recent growth, that some of the patents have not expired by which certain companies claim peculiar rights in the business.

The business dates back but little more than a third of a century, and the cars of that time were of every conceivable form, many of them in which the berths were open as in a canal packet. The accommodations were of the simplest character and the charges correspondingly light. As the various short lines of railroads became consolidated and operated under one management, the demand for better accommodations for night travel called into being the Wagner, Pullman and other sleeping cars. These offered superior accommodations and the charges were proportionately increased. These companies proposed to a traveller in effect to give him a safe and commodious car with a double berth to sleep in, and provide the necessary porters to wait on him, for a fixed price paid in advance above the charge for his transportation. These companies claim that they are not common carriers and therefore are not liable as such for a failure to carry those who have paid for the accommodation, and that they are not liable like innkeepers, and therefore not responsible for the safekeeping of the passenger's goods and baggage, and it must be said that a number of cases sustain their contention.

The law upon this subject has not yet become crystallized, and must ultimately in the absence of statutory regulations be determined by the application of common law rules in analogous cases. It may be well to examine the character of the cases decided. In *Pullman etc., Co. v. Gaylord* (23 Am. Law Reg. 788) the action was brought to recover the sum of \$300, the value of a diamond scarf pin stolen from the defendant while asleep.

In *Scaling v. Pullman etc., Co.*, (24 Mo. App. 29) the action was brought to recover \$245, the value of a gold watch and pair of pantaloons stolen while the passenger was asleep. In *Bevis v. B. & O. Ry. Co.*, (26 Id. 19) the action was brought to recover \$500, the value of a scarf pin, and \$5, in money alleged to have been stolen while the passenger was asleep. In *Woodruff etc. Co.*,

v. *Dahl* (84 Ind. 474) the loss alleged was a gold watch of the value of \$172, and money amounting to \$111.50. In *Blum v. Southern etc., Co.*, (Flippins' R. 500) the action was to recover \$3,135, lost by the plaintiff while riding in a sleeping car. In *Pullman, etc., Co. v. Smith*, (73 Ill. 360) the action was brought to recover the sum of \$1,180, alleged to have been lost on one of the plaintiff's cars. In the case of *Illinois, etc., Ry. Co., v. Handy* (63 Miss. 609) the defendant was riding in a chair car and claimed to have lost his pocket-book in the car. It was found by the officers of the company and returned to him apparently unopened. On being delivered to the owner it appeared that it contained \$57 in money. He took the book and its contents and stated "it was all right," but afterwards returned and claimed that \$308 had been abstracted from the book, and the action was brought to recover that amount.

In *Lewis v. N.Y. Sleeping Car Co.*, (143 Mass. 267) the action was brought to recover \$200 claimed to have been stolen from the plaintiff while he was asleep in the car. In *Root v. Sleeping Car Co.*, (28 Mo. App. 199) the action was brought to recover the sum of \$464, which the plaintiff alleged was stolen from him by the fraud or negligence of the defendant while the plaintiff was a passenger on his car.

In *Pullman etc., Co. v. Matthews* (74 Tex. 654) the defendant early in the morning, left his pocket-book, which contained, as he alleged, \$165, lying on the bedding of his berth and went to the wash room and afterwards went forward sixty or seventy yards to a wrecking train, and the action was brought to recover the loss of the money.

In the case of *Pullman etc., Co. v. Gardiner*, (16 Am. and Eng. Ry. cases) the defendant on retiring placed his gold watch, of the value of \$250, and \$55 in money, in an inside pocket of his vest, and put the vest under the outside corner of the mattress of his berth and went to sleep, and they were stolen during the night, and the action was to recover their value.

In *Wilson v. B. & O. R. Co.*, (32 Mo. App. 199) it was held that a passenger who had put \$670 in his coat pocket and placed the coat under his pillow was guilty of gross negligence in leaving it there while he went to the water closet.

In *Hampton v. Pullman etc., Co.*, (42 Mo. App. 134) the company was held liable for a failure to use reasonable diligence to protect its patron's baggage delivered to the company. In *Car-*

penter v. N. Y., etc., Ry. Co., (124 N. Y. 53) money was stolen from a passenger while asleep in a sleeping car, and there was only one employee on the car who acted as conductor, porter and bootblack, and it was held that the company had not exercised due care.

In a number of the cases cited, in addition to the proof of loss some act of negligence of the company was also required to be proved. One of the earliest cases decided was *Plumm v. Pullman etc., Co.*, (3 Cent. Law J., 592) by Judge Brown of the United States District Court of Tennessee, in which he held that the company was not liable either as an innkeeper or bailee for money stolen from a passenger's pocket. In all these cases it was held that the company was not liable as an innkeeper. The goods which were lost, so far as appears, were retained by the owners and were not delivered to the employees of the several sleeping car companies. In most cases the money carried on the person exceeded the amount necessary for travelling expenses, while in all cases the jewellery was retained by the owner. Those cases, therefore, and others of a similar character, do not form a fair criterion to determine the liability of sleeping car companies. Judge Brown seems to have discussed several questions not before the court, viz.: That while the company was not liable it was to take reasonable care of its guests and property, especially while said guests were asleep. He also attempts to draw a supposed distinction between an innkeeper and sleeping car company. Some of the distinctions referred to will be noticed presently.

Other *nisi prius* cases of about the same date may be found, among which are *Palmer v. Wagner*, (11 Alb. Law J., 149) in which the Marine Court of New York held that the company was neither an insurer, innkeeper, or transporter, but must nevertheless keep a reasonable watch to protect a passenger and the property about his person during sleep.

That the two cases last cited have been taken as precedents and substantially followed without question is apparent to any person who will consider the reported cases. It may be well, therefore, to examine the grounds upon which these decisions are predicated. An innkeeper at common law is "a person who makes it his business to entertain travellers and passengers and provide lodgings and necessaries for them and their horses and attendants." (Bacon's Abr. Inns and Innkeepers *B. Kistem v.*

Hildebrand, 9 B. Mon. 72.) In the case last cited it is said "that a man may be an innkeeper and liable as such though he have no provision for horses. It is not necessary that he should have a sign indicating that he is an innkeeper, but it must be his business to entertain travellers and passengers."

To constitute an inn at the present time it is not necessary that the guests be provided with food. Thus, where a public house is kept upon the European plan—meals being furnished to those who desire, paying only for what they receive, or taking their food at some other place, it is nevertheless an inn. *Krohn v. Sweeney* (2 Daly, 200); *Burnstein v. Woodward*, (33 N. Y. Sup. Ct., 271.) So where a general in the army of the United States with his family were guests at the restaurant of a hotel where they paid only for what they received, and had lodgings at the hotel, they were held to be guests and not boarders. (*Hancock v. Rand*, 94 N. Y. 1.) In the case cited the judge says that hotels are conducted differently now from what they were formerly. "Furnishing rooms at a fixed price and meals at prices depending upon the orders given at the usual hotel rates constitutes a material difference in the system of keeping hotels from that which formerly existed." To constitute an inn, therefore, it is not necessary that it should furnish meals to the guests nor that it should have accommodation for horses and other animals of travellers. But it is said that an innkeeper has a lien upon the traveller's baggage for the amount of his bill, and that no such lien exists in favor of the sleeping car company. I am not aware that this question has ever been presented to any court for the reason that the sleeping car companies in all cases, so far as I am aware, transact all their business by selling tickets for berths or sections and demand payment in advance. Hotelkeepers do the same in many cases where a doubt exists as to the responsibility of the guest, and no doubt by rule might require prepayment in every case. There is no occasion, therefore, for a lien in the case of the sleeping car, and for that reason, none so far as we know has been attempted. It is insisted, however, that there is no contract with the hotelkeeper as to the length of time the guest will stay, and in this regard the contract differs from that of the sleeping car company, which is for definite service. This distinction is more technical than real. Suppose a traveller should go to a hotel, and on registering should say to the landlord: "I will stay with you two, three or four days, as the case

may be," would he thereby become a mere boarder and not a guest? No one will so contend. He would be there temporarily until his business was completed, and the innkeeper would be liable to him for any dereliction of duty of himself or employees. Now, suppose a traveller purchases a first class ticket and sleeping car ticket from St. Louis to Chicago, and enters the sleeping-car for the use of which he has paid in advance, will the fact that the contract is to continue until the car arrives at Chicago, some ten or twelve hours thereafter, change the contract from that of the innkeeper? If so, some good reason should be given for the exemption.

Considerable stress is laid upon the fact that the several berths are not separate rooms, and therefore the occupants cannot lock the door and exclude all intruders. To some extent this is true, but has it ever been held that a hotel-keeper was excused because he was compelled to put two or more guests, strangers to each other, it may be, into the same room? Scarcely a year passes in any city or town, but by reason of some convention or other meeting, the hotels are filled and cots placed in the aisles, which are occupied by guests during the night, yet no landlord would claim exemption for loss upon the ground alone that his house was crowded, or that he did not have a separate room for each guest. Suppose a sleeping car to remain stationary at one point for months or years as a place for the entertainment of travellers, and patronized as such, would the fact that it was a car instead of a house, exempt it from the liabilities of an inn? If so, then a car stationed beside an inn and doing the same business would, without reason, be freed from liability, while the innkeeper would be held; but the law does not thus discriminate in favor of any one. Suppose the car was stationed at some point and in fact an inn, and its proprietor therefore responsible to his guests, would this liability cease because the car was daily moved from place to place? If so, why?

We are told that the car differs from an inn in the character of its guests. That an inn must receive all who apply while the car can receive none but those who hold first class tickets or other means of transportation entitling them to ride in first class coaches.

But this is not a valid objection.

Every person by paying the price of a first class ticket may become entitled to purchase a ticket and travel in a sleeping car.

It is merely a matter of expense. The same rule applies to inns. Thus the rates at a first class inn rate from three to five dollars a day, at a second class about one half as much, and third class from one third to one half of the amount. As well complain that a traveller could not stop at a first class inn for the price charged at a second or third class inn. The truth is, the accommodations on a sleeping car are similar in kind to those supplied at an inn. In *Pullman Co. v. Lowe*, (28 Neb. 248, 249) the defendant placed a valuable overcoat in the care of the porter, and it was stolen from the car, probably by an employee. The defendant recovered the value of the coat. It is said: "The liability of innkeepers is imposed from considerations of public policy as a means of protecting travellers against the negligence or dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travellers. Besides, where loss is sustained, neither party being in fault it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service." (*Mason v. Thompson*, 9 Pick., 280.)

[Concluded in next issue.]

ONTARIO DECISION.

Bailment—Storage of wheat—Loss by fire—"Owner's risk."

A quantity of wheat was delivered by the plaintiff to the defendant, a miller, under a receipt stating that the same was received in store at owner's risk, and that the plaintiff was entitled to receive the current market price when he called for his money. The wheat, to the plaintiff's knowledge, was mixed with wheat of the same grade and ground into flour. The mill, with all its contents, was subsequently destroyed by fire, but there had always been in store a sufficient quantity of wheat to answer the plaintiff's receipt.

Held, that the receipt and evidence in connection therewith, showed there was a bailment of the wheat and not a sale.

Negligence on the part of defendant was attempted to be set up, but the evidence failed to establish it.—*Clarke v. McClellan*, Common Pleas Division, March 4, 1893.

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CURRENT TOPICS.

In Canada the privilege accorded to members of the legislatures, of being supplied with letter paper and envelopes, was gradually extended to include costly trunks filled with valuable articles. Norway furnishes a more amusing illustration of elastic interpretation of members' privileges. In addition to their daily allowance, members are entitled to free nursing and medical attendance, "if ill during the session." This privilege has been extended by the members themselves to courses of gymnastics, massage, baths, wine for the sick ("medical comforts"), drawing and stopping teeth, etc.

The facts of what has been termed a strike of the Spanish bar, are given as follows in a communication from a distinguished member of the Madrid Bar to the *London Law Journal*:—"Spain was formerly divided, for juridical purposes, into fifteen great circuits, in each of which there was a Court of Appeal for the civil and criminal business of the district, disposed of by the judges of first instance. Each of these courts comprised the tribunals of first instance of several provinces. Subsequently a change was made in Spanish criminal jurisdiction. The judges of first instance were charged only with the administration of civil justice; and to the fifteen Courts of Appeal

were added other courts for the trial of criminal cases—one at least being allotted to each province. In the past year the number of these courts has been diminished to thirty-four—being one for the capital of each province in which there was not a Court of Appeal. The present Minister of Justice, however, was set upon effecting economies, and proposed to the Legislature to abolish these thirty-four criminal courts, and to substitute for them the judges of first instance to whom I have referred. The advocates of twenty-three out of the thirty-four capitals which will thus be deprived of their Court of Criminal Jurisdiction laid before the Minister of Justice a projected reform which was as economical as his own—namely, to establish in each province a single court for civil and criminal affairs in lieu of the fifteen existing Courts of Appeal. The Minister of Justice not having received this proposal cordially, the advocates of twelve provincial capitals have struck work, as they declare, in the interests of justice; but, according to the Minister, merely for the protection of their personal practice and privileges. Public opinion is far from regarding this strike with sympathy."

In Dr. J. Dixon Mann's recently published work on Forensic Medicine and Toxicology, the author makes the following observations with reference to the position of medical men in the witness-box:—"It is an honourable law of the medical profession that confidential statements made by a patient to a medical adviser are held to be inviolable secrets. In a Court of law this inviolability is overruled; a medical witness, if asked, is bound to reveal any secrets that have come to his knowledge whilst in attendance on a patient. However repugnant it may be to the feelings of a medical man to violate the confidences of the consulting-room, he has no option. If, when in the witness-box, he refuses to answer a question involving the betrayal of a secret which is really the pro-

perty of his patient—it having been revealed to him in trust and under the conviction of absolute confidence—he renders himself liable to committal for contempt of Court. It is conceivable that a medical man might feel the obligation to secrecy so great as to compel him to decline to answer a question involving betrayal of the confidence of his patient. Such a step, however, should not be taken without a profound conviction of duty. A good citizen obeys the law, although he may have scruples in doing so; therefore, a witness should not set his private judgment against authority without very searching self-inquiry; an obstinate conviction must not be mistaken for a sense of duty. In the majority of cases it will probably be compatible with his sense of duty if the witness enters a protest against answering the question and then bows to the requirements of the law."

NEW PUBLICATION.

The Criminal Code of the Dominion of Canada, as amended in 1893, with Commentaries, Annotations, Precedents of Indictments, etc., by the Hon. Mr. Justice H. E. Taschereau, one of the Judges of the Supreme Court of Canada. Toronto, The Carswell Co., Publishers.

This work, the preparation of which was referred to in our last issue, has now been issued, and the first reflection which it excites is one of admiration and surprise at the great industry and ability of the learned editor in completing, within so short a time, such a comprehensive review of the criminal code, covering 1080 pages, while engaged in the arduous business of our highest Canadian Court of Appeal. The preface points out the principal changes effected by the Criminal Code, which came into operation on the 1st instant,—what has been abolished, what has been changed, and what has been added. This synopsis must prove extremely useful to the practitioner. It would have been desirable that these points should have been noted in an official report accompanying the Statute itself, but in default of this the learned judge's observations will be of great use in practice. The work proceeds to treat of each of the 983 articles of the Code, with

copious citations from the standard text-writers and references to decisions. The mere list of cases cited occupies fifty pages. Those who are acquainted with the two previous editions need not be informed that the work evinces throughout the great learning, ability and diligence of the author, and that it will be indispensable to all who have any share in the administration of the criminal law. The typographical execution of the book is excellent, and reflects credit upon the publishers, the Carswell Co., of Toronto.

SUPERIOR COURT ABSTRACT.

Jugé:—A une action en dommages pour injures verbales et diffamation, le défendeur peut plaider qu'il n'a jamais dit les paroles incriminées, mais qu'il en a dit d'autres, et que ces autres paroles étaient justifiées par les circonstances dans lesquelles elles ont été prononcées. *Langelier v. Casgrain*, C. S., Québec, Caron, J., 5 mai 1893.

*Vente simulée—Action en annulation par créancier postérieur—
Délai—C. C. 1039, 1040.*

Jugé:—Une vente simulée et frauduleuse ne fait pas sortir le bien vendu du patrimoine du vendeur, et peut être attaquée par les créanciers du vendeur, même plus d'un an après qu'ils l'ont connue, et par les créanciers postérieurs aussi bien que par ceux antérieurs à cette vente.

Dans l'espèce la vente attaquée est annulée comme frauduleuse et simulée, à la poursuite des demandeurs qui ne sont devenus créanciers du vendeur qu'après la passation de l'acte. *Andrews, J., dissente.*—*Gendron et al. v. Labranche*, Québec, en révision, Casault, Routhier, Andrews, JJ., 30 mars 1893.

Workmanship—Claim for value of—Destruction of object before acceptance of work.

The plaintiff undertook to paint statues for the defendant at a fixed price for each statue, the defendant furnishing the unpainted statues. A number of the statues, after they had been painted, were destroyed by a fire which occurred in defendant's premises, before the statues had been accepted by him and before he had been put in default to receive them.

Held:—That the plaintiff was not entitled to recover from the defendant the price stipulated for the painting.—*Rozetsky v. Beullac*, S.C., Montreal, Doherty, J., November 18, 1892.

ONTARIO DECISION.

Railway company—Carriers—Liability as.

The plaintiff delivered a quantity of apples to the defendants at their warehouse for the purpose of shipment by the defendants' railway, and, on sufficient being delivered to fill a car, applied for a car, and was promised one at a named date. The defendants failed to furnish the car at the date specified, and, a fire occurring, the apples were destroyed.

Held, Rose, J., dissenting, that the responsibility of the defendants was that of carriers and not of warehousemen, and therefore they were liable for the loss sustained by the plaintiff.—*Milloy v. Grand-Trunk R. Co.*, Divisional Court, March 4, 1893.

CORONERS' INQUESTS.

The Committee of Management of the Radcliffe Infirmary at Oxford has addressed a petition to the Lord Chancellor complaining of the action of the coroner for the city in ordering the removal of the bodies of patients who have died in the infirmary to the mortuary for the purpose of holding inquests. An opinion given by counsel as to the legality of these removals is appended to the petition, which said that these removals were not justified. By the old law the inquest had to be held *super visum corporis*, and though this has not been done (if it means actually in presence of the body) for more than two hundred years, there is said to be no trace of any alteration of the law that the coroner and jury must view the body where it lies, with the exception of a body moved to a mortuary for the purpose of a *post-mortem* examination. Accordingly, the committee beg the Lord Chancellor to intervene to prevent a course which they believe to be illegal. The coroner, replying to the petition and opinion, says that no injury to the body is suggested and no complaint by the friends of the deceased. He says that the removal of a body from one place to another has been the practice from time immemorial, and the power now in question was discussed in 1891 in a case at Canterbury, and the Lord Chancellor expressed no disapprobation of the practice of removal there. He asks whether the body is to remain at the spot where it falls at death, and, if so, how if it be at the bottom of a river. If this be law, he points out that most of the mortuaries, the creation of modern statutes, would be useless, and it must be illegal to use them for

most of the purposes for which they have been provided throughout the country at the public expense. The secretary to the Lord Chancellor replies to the petitioners that 'his lordship has communicated with the coroner on the subject of your petition, and has informed him that, while his lordship thinks it desirable not to express an extra-judicial opinion on the subject of the coroner's jurisdiction in relation to the removal of a body, he regards it as of the highest importance that in assuming such a power, the coroner should be guided by the consideration whether grave public inconvenience would follow from any other course.' In this particular instance the difference between the committee and the coroner as to the legality of the removal appears to be of long standing, for the coroner, in his reply to the petition, refers to a remark of Mr. Secretary Cross to the committee when they solicited his intervention—that 'the officers of the infirmary should readily conform to all legal requirements of the coroner, and should render to him every assistance in the conduct of his inquest.'—*Law Journal (London)*.

EXTRAJUDICIAL CONFESSIONS.

The common law has always been hostile to confessions or admissions of guilt not made with absolute free will. In this respect it differs from the doctrine of the civil law and the derived usage of continental jurisprudence, under which the normal method of trial was, and is, to extract from the accused by torture or the ingenious interrogatories which form the staple of French detective literature, and led to the fall of the Star Chamber, such an admission of his guilt as would save the need of extrinsic evidence. Without stopping to trace out the origin of this distinction, we may suggest that it arose *in favorem vite* from the severity of the old punishments for felony, and from the right of the accused to select the mode of his trial, and the old theory that his guilt depended on the verdict of the vicinage—i.e. local public opinion—coupled with a well-grounded hostility to any method which would enable the Crown to work forfeitures by extracting admissions, and it is curious to observe that the one case in which confession, as distinguished from a plea of guilty, was essential was where the offender claimed benefit of clergy, and the consequent right to abjure the realm, as in a case where the jurisdiction of the common law was declined by a privileged

class. In modern times the circumstances which render the admission or confession of a prisoner receivable in evidence against him have been again and again discussed, and from time to time uncertainty has arisen in the administration of the law. But, by the decision in *Regina v. Thompson*, on April 29, these doubts and difficulties appear for the present to have been cleared away. In that case the prisoner was convicted of embezzlement upon evidence which included a confession by him. One Crewdson, at whose instance the warrant for the prisoner's arrest had been issued, had an interview with the prisoner's brother and brother-in-law, at which Crewdson suggested that it would be the right thing for the prisoner to make a clean breast of it, but made neither threat nor promise. This interview was communicated to the prisoner, who subsequently made to Crewdson and a director of the company whose servant he was the admissions put in evidence. Upon these facts the Court of Criminal Appeal held that a confession, to be admissible, must be free and voluntary, and made without any inducement from any person in authority, and that where any doubt exists as to the free and voluntary character of the confession, the burden of proof that it was voluntary rests upon the prosecution. The result of this judgment is to restate clearly the common law rule, and to restrain any tendency to infringe it by throwing on the accused the duty of displacing any presumption in favour of the voluntary character of confessions of the kind in question. Of the correctness of the decision there can be no doubt. It casts upon the party tendering the evidence the burden of satisfying the conditions which alone can render it admissible, and the views of the judges fall in with the enactments regulating admissions made in Court in criminal cases. This is clearly shown by the caution prescribed by 11 & 12 Vict. c. 43, s. 18. to be given by the magistrate before a person accused of an indictable offence is called upon for his answer; 'You have nothing to hope from any promise of favour and nothing to fear from any threat which may have been made to you to induce you to make any admission or confession of guilt.' These words do not apply to statements made before the caution, and are meant to warn the accused that everything said in Court after the caution is admissible in evidence notwithstanding previous threats and promises. The last proviso of the section above cited provides that the admissibility of this statement in no way affects the right to put in evidence any extrajudicial ad-

mission or confession by the accused, the admissibility of which rests on the considerations stated in the judgment in *Regina v. Thompson*.—*Law Journal* (London).

THE CUSTOM OF THE MUSIC HALL.

In the Westminster County Court, (May 11) the case of *Loftus v. Harris* came before his Honour Judge Lumley Smith, Q. C., and a jury. The action was brought by Miss Marie Loftus, a burlesque actress, against Sir Augustus Harris, as managing director of the Palace Theatre of Varieties (Limited), to recover the sum of 43*l.* 6*s.* 8*d.*, which she alleged was due to her under an agreement. Mr. J. P. Grain was counsel for the plaintiff, and Mr. H. Kisch for the defendant. Mr. Grain said that the plaintiff was a popular burlesque and serio-comic actress. She claimed for one week's salary and a *matinée*. She entered into a contract with the defendant to appear in the title-rôle in 'Little Bo-peep,' the pantomime at Drury Lane Theatre, in 1892-93. She was to have 45*l.* a week, and in consideration of that she agreed that when she was in town she would perform only at the Palace Theatre. After the pantomime season she sang at the Palace, taking an early 'turn.' When she came off she was told that she would have to take another 'turn' about two hours later; but she refused to do so, as it was against the custom of the music-hall profession as well as against the terms of the contract. To show how much Sir Augustus Harris valued her services, he had entered into an agreement with her for her to perform in his next (1893-94) pantomime at a weekly salary of 75*l.*—The plaintiff, on oath, bore out counsel's statement. In cross-examination, she said that she did object to being put on to sing to empty seats so early in the evening. The custom of the music-hall profession was 'to do only one turn.'—The proprietors and managers of the Middlesex, Queen's, Canterbury, and other music-halls gave evidence as to the custom being for artistes to 'do' only one turn a night.—Sir Augustus Harris said that he engaged the plaintiff to do more than one turn. There was no question as to turns, but an engagement for whatever was required. Cross-examined: Several artistes performed several times a night.—Mr. Kisch contended that there was no music-hall question in the case, as the Palace had not yet received the music-hall license, although granted. One 'turn' only would mean a matter of perhaps six

or seven minutes, and the plaintiff claimed that she was to have 40l. a week for that.—The jury found a verdict for the plaintiff for 40l., and his Honour gave judgment, with costs.

LIABILITY OF A SLEEPING CAR COMPANY FOR LOSS OF BAGGAGE.

[Concluded from p. 212.]

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodations at an inn and those on a sleeping car, except that the latter are necessarily on a smaller scale than at an inn.

In both cases the porter meets the traveller at the door and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveller is not required to sit in his seat during the day, but may if he so desire, go forward into the other cars on the train, and at stations may go out on the platform.

A passenger in a sleeping-car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveller, and to the company, and is a circumstance in the case.

If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves might engage one or more berths in a car, and at the first opportunity leave the car carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can and escape, yet no one could contend that the innkeeper would not be responsible for the property so stolen, and this whether it is stolen at night or in the day time, yet in many of the large inns of this country at least, there are numerous doors for ingress and egress, while in a sleeping car there are but two. Where meals are served on a sleeping car, no one would contend that it differed from an inn in its accommodations.

An examination of the later cases will show a disposition on the part of the courts to hold the companies to a strict account, and many of them require vigilance and attention of the employees far beyond those required of mere bailees. (*Tracy v. Pullman etc. Co.*, 67 How. Pr., 154; *Carpenter v. N. Y. etc. Ry. Co.*, 124 N. Y. 53; *Pullman etc. Co. v. Pollock*, 69 Tex. 120; *R. R. Co. v. Walrath*, 38 O. S. 461; *Louisville etc. R. Co. v. Katzen-*

breigen, 16 Lea. 380; *Woodruff v. Duhl*, 84 Ind. 474; *Lewi v. N. Y. S. C., Co.* 143 Mass. 269; *Ill. etc. R. Co. v. Handy*, 63 Miss. 609.

These changes in the decisions in favor of strict vigilance on the part of the employees show that the grounds on which the decisions were originally based are not regarded as satisfactory, and a degree of vigilance is insisted upon which is never required of a mere bailee. This brings us back to the question as to the nature of sleeping car companies. They are not common carriers because it is not their business to transport passengers. They offer them, however, while being carried to their destination, comfortable cars, well kept and ventilated, with all toilet conveniences and good beds on which to rest. Now the furnishing of food for guests and stables for their animals are incident to the business of keeping an inn, yet neither is indispensable to constitute an innkeeper. The real business consists in the innkeeper inviting travellers to his house and providing for their comfort and safety while they stay, be it a day, week or month. The law implies a guarantee on the landlord's part that neither the guest nor his property shall suffer harm while in the landlord's care. Is there not the same implied guarantee on the part of the sleeping car companies? One of the controlling reasons for imposing a liability on the landlord is that guests cannot protect themselves during sleep, and therefore must rely on the honesty and good faith of the innkeeper. Do not all these reasons apply to sleeping cars? We must bear in mind that it is their business to furnish beds to their patrons, and that these patrons are helpless during sleep and must rely on the honesty and good faith of the companies to protect them. This the companies have the means to do, which ordinarily the travellers have not. Suppose a traveller leaves Boston, New York, Philadelphia, Baltimore or Washington, over some of the leading railway lines, for San Francisco, and takes a sleeping-car and his meals on the train, the charges will average probably from five to six dollars per day while the average charges at first class hotels along the route will not exceed four dollars per day. In addition to these charges the porters are paid a considerable part of their wages by the passengers.

In any event the sleeping car charges will considerably exceed those at a first class hotel, on the same route. Now, can any valid reason be given why the traveller while stopping at an

inn along this route should be protected but will be without protection on the sleeping car?

If the reasons given by the Massachusetts Supreme Court in the case cited are sound, that the liability of innkeepers is imposed from considerations of public policy as a means of protecting travellers from the negligence or dishonest practices of the innkeeper and his servants, then the same reasons apply with equal force to sleeping car companies.—*Samuel Maxwell in American Law Review.*

"MISSING WORD" COMPETITIONS.

An ingenious attempt to establish a form of "missing word" competition which should not be an illegal game of chance within the meaning of the Lottery Acts was defeated by Mr. Justice STIRLING on Saturday last in the case of *Rayner v. Answers*. A paragraph was inserted in the columns of *Answers* to the effect that the origin of the old City charities could not be precisely determined "as they had grown so—," and then came the familiar blank which competitors were required to supply. The missing word was *imperceptibly*, and it was contended on behalf of the newspaper that as this was, if not the only, at least the most appropriate term with which to fill the hiatus in the paragraph, its selection required skill, and therefore the competition was not a lottery. Mr. Justice STIRLING, however, overruled this contention, and directed that portion of the proceeds of the competition which had been paid into Court, to be repaid to the proprietors of *Answers* in order that they might meet the claims of the unsuccessful competitors. There can be no doubt that his lordship's decision was correct. Even if we make the large concession that the growth of the City charities has, in fact, been imperceptible, it is obvious that *silently* or *invisibly* would have brought out the meaning of the paragraph quite as clearly as the word which the promoters of the competition used. As between these, and possibly other, synonyms the determination of the question of priority was a matter of chance, and therefore the competition was a lottery within the well-ascertained meaning of the term. The result of this interesting case will surely be to render the revival of the missing word competition in any form practically impossible. Every point of which the nature of the subject admits has now, we should imagine, been taken and judicially considered. First, in the prosecution of *Pick-Me-Up*,

the purely arbitrary selection of a 'missing word' before the competition was held illegal; then, in the case of *Barclay v. Pearson*, the deliberate choice of a word after the competition was judicially condemned and the legal position of the successful and unsuccessful competitors was defined; and now the doctrine laid down in *Barclay v. Pearson* has been held by implication to apply to the case of arbitrary selection from a limited number of synonyms. It is a matter for congratulation that the Lottery Acts, in spite of their comparative antiquity, have been found strong enough to put down the very mischievous species of national gambling to which these missing word competitions were giving rise.—*Law Journal* (London).

INTERNATIONAL ARBITRATION.

In the English House of Commons, June 15, Mr. Cremer moved on the order for going into Committee of Supply, a resolution declaring that this House had learnt with satisfaction that both Houses of the United States Congress had authorised the President to conclude a treaty of arbitration with any other country; and expressing the hope of this House that Her Majesty's Government would, at the first convenient opportunity, open up negotiations with the Government of the United States with a view to the conclusion of such a treaty between the two nations, so that any differences or disputes arising between the two Governments which could not be adjusted by diplomacy should be referred to arbitration.

Sir J. Lubbock seconded the resolution.

Mr. Gladstone said that, although a treaty of arbitration was undoubtedly a novelty and an object which in former times it would have been wild to dream of, yet he did not think it was beyond the reach of a reasonable hope that such a treaty might before long, under favourable circumstances, be concluded between this country and the United States. It was the complexity of the foreign relations on this side of the United States which imported the greatest difficulty into this case. Criticising the terms of the resolution, the right hon. gentleman pointed out that it was not strictly accurate to say that the two Houses of Congress had authorised the President to conclude treaties of arbitration. What Congress contemplated was that the initiative should be taken by the President, and as a matter of international courtesy we ought not to adopt words which would prevent that

initiative from being taken. The object in view would, in his judgment, be completely gained if the following words were added: 'That this House, cordially sympathising with the purpose in view, expresses the hope that Her Majesty's Government will lend their ready co operation to the Government of the United States on the basis of the foregoing resolution.' After briefly explaining what had taken place between the two Governments in order to enable the House to understand the present situation, the right hon. gentleman dwelt on the value of these resolutions in favour of arbitration, and expressed a hope that a central and impartial tribunal might eventually be established for the settlement of international disputes.

Mr. Gladstone's resolution was ultimately agreed to.

CONTEMPT OF COURT.

It is interesting to compare the opinions expressed in leading articles in the daily press on the subject of contempt of court as applied to them with the rulings, *dicta*, and decisions of reported cases. A writer in a morning paper recently attacked what he called a 'mischievous prerogative,' and stated that 'the whole of the jurisdiction claimed and exercised by the judges is utterly inconsistent with the freedom of the press and with the public interest in knowledge of the truth.' It is significant that the article containing these and other equally strong expressions was afterwards copied *in extenso* into the columns of the *Times*.

There is no doubt that the rules are strict, but it is equally certain that they are constantly infringed by papers of a certain class with the sole object of creating a paying sensation, and not by any means consistently with 'the public interest in knowledge of the truth.' Even interlocutory proceedings such as applications in chambers are now sometimes reported when they occur in cases of which the names are known to the reading public, notwithstanding that one of the judges has stated that this practice is new and improper, and such reports are of course read by many people who, from being wholly unacquainted with the technicalities of procedure, are likely to mistake their meaning. The liberty of the press is, of course, a safeguard which ought to be preserved at any cost, and one of the highest judicial authorities on the Bench has expressed his conviction that even the action of Her Majesty's judges ought to be open to fair criti-

cism, but all such criticism and comment ought to be impartial and, in its way, judicial, not impulsive or careless, and it is important to recollect that the rules as to 'fair comment' do not extend to matters still pending in the Courts, because, of course, such publications may exercise an unintended and indirect influence on the minds of those who have to decide on the merits of some particular case.

The fact is generally overlooked that an intention to pervert the course of justice is not necessary to make a newspaper comment amount to a contempt of Court: 'Anything which will have that effect may be punished' all the same. What is to be considered is, as Lord Langdale said in *Little v. Thompson*, 2 Beav. 129, whether the matter complained of is calculated to, or likely to, disturb the free course of justice, and when this is to be fairly inferred, denial of intention can only go in mitigation of punishment, and conversely the appearance of such an intention makes it 'a contempt of the highest order.' It is a still further aggravation if it is proved that the publication called in question was instigated or authorised (even though secretly, as in *Daw v. Eley*, L. R. 7 Eq. 49) by a party to the suit or his solicitor. 'The principle,' said Lord Romilly, 'is quite established in all these cases, that no person must do anything with a view to pervert the sources of justice, or the proper flow of justice; in fact, they ought not to make any publication or to write anything which would induce the Court, or which might possibly induce the Court or the jury, the tribunal that will have to try the matter, to come to any conclusion other than that which is to be derived from the evidence in the cause between the parties, and certainly they ought not to prejudice the minds of the public beforehand by mentioning circumstances relating to the case.'

The *Tichborne Case* caused so much excitement throughout the country that comments were freely made upon it from the first appearance of the claimant until his conviction, and proceedings were taken by and against him and his partisans. In *Tichborne v. Mostyn*, L. R. 7 Eq. 55, Vice-Chancellor Page-Wood quoted a judgment of Lord Hardwicke pointing out the necessity for preventing misrepresentation of proceedings in Courts of justice, and the 'pernicious consequence' of prejudicing the public mind. In *Skipworth's Case*, L. R. 9 Q. B. 230, Mr. Justice Blackburn emphasised the danger of 'appealing to the public,' and quoted Lord Cottenham's judgment in *Lechmere Charlton's Case*, 2 My. & Cr.

342; and the principle to be followed was well expressed in another of these cases, *Tichborne v. Tichborne*, 39 Law J. Rep. Chanc. 328, by Vice-Chancellor Stuart, who said, 'whatever tends to prejudice a cause, whatever matter is published to the world referring to the parties, to the litigation, and to the subject matter of it in such a way as to excite a prejudice against them, or their litigation, is a contempt of Court.' The most recent case on the subject is *O'Shea v. O'Shea and Parnell*, in which Mr. Justice Butt inflicted a heavy fine, after giving judgment in the sense of the previous decisions. Applications to commit have lately become more frequent, and, as a rule, they have simply been dismissed with or without costs against the defendant, who always apologises in Court; but the strict rule remains, and is likely to remain despite the efforts of those who say that 'contempt of Court' should be confined to interruption of judicial proceedings and intimidation of witnesses.—*Law Journal* (London).

GENERAL NOTES.

THE JUDGES AND THE LAW.—The law, according to the well-known legal maxim, is a thing *quod quisque scire tenetur*. We may admit that the presumption of knowledge is somewhat strained in the case of laymen; but it is alarming to find an eminent Queen's Counsel, who has held high legal office, casting a doubt on Her Majesty's judges' knowledge of the law. 'The judges,' said Sir Henry James during the discussion on the fourth clause of the Home Rule Bill, 'know the common law—more or less,' he added after a pause, amidst the laughter of an irreverent House of Commons.—*Law Journal*.

HAPPILY ENDED.—A pleasing incident, says the *Westminster Gazette*, occurred some fifteen years ago, in a northern town, where Sir Henry Hawkins was trying a young man for, in a moment of jealousy, assaulting the girl with whom he was "keeping company." The prosecutrix broke down in floods of tears while giving evidence against him. 'I love him still,' she cried, 'and will marry him to-morrow if you will only release him, my lord.' The prisoner was found guilty, and ordered to be imprisoned for one day. The banns had already been published, and on

his release next morning the fortunate young man found that the judge and sheriff had between them provided a wedding-ring, a carriage to convey the couple from the church, and marriage fees, and the wedding took place next day.

THE BARBED-WIRE FENCES BILL.—The language of this bill affords a curious illustration of the purposeless looseness of expression which may sometimes be found in Acts of Parliament. It is too clear for argument that a fence made of barbed wire which is dangerous to persons lawfully using a highway is a nuisance at common law. It may be the subject-matter of an indictment, or of an action by any person sustaining particular damage by reason of it. If authority were necessary for this proposition, the case of *Stewart v. Wright*, decided on May 30 by Mr. Justice Mathew and Mr. Justice Wright, is enough. The bill without creating any new liability, enables a local authority to require and enforce the removal of such fences in a summary way. The language in the body of the bill rightly refers to land adjoining a 'highway,' and to persons or animals properly using such 'highway.' The marginal note, however, refers to the removal of barbed wire from 'public thoroughfares,' though a highway need not be a thoroughfare, and barbed wire is surely neither more nor less dangerous in a *cul-de-sac*. The title of the bill further amplifies the expression into 'roads, streets, lanes, and other thoroughfares!' Roads, streets, and lanes are not necessarily thoroughfares, and the bill has no application to roads, streets, or lanes unless they are highways. The only operative word in the bill is 'highway.' That term is clear, simple, and sufficient. These eccentric rhetorical variations are not only useless, but embarrassing.—*Law Journal* (London).

THE DEATH SENTENCES OF NINE YEARS.—A return just issued shows that during the years 1884-92, inclusive, 256 persons were sentenced to death for the crime of murder in England and Wales. Of these, 145 were executed in due course; one was pardoned; in ninety-five cases the sentence was commuted to penal servitude for life; eight were removed to Broadmoor, having been certified to be insane; and in seven cases the prisoners were let off with minor terms of penal servitude.

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HOMICIDE BY NECESSITY.

SUPREME COURT OF ALABAMA.

January 26, 1893.

ARP V. THE STATE.

Arp was convicted in July, 1892, at the Alabama Circuit Court, of murder in the first degree, and was, accordingly, sentenced to death. He had murdered one Payne, in order to prevent him from appearing against him and two other men, Buckhalter and Leith, charged with retailing whiskey without a licence. Arp's excuse for the homicide was 'that Buckhalter and Leith threatened to take his life unless he killed the deceased; that they were present, armed with double-barrelled shot-guns, and threatened to kill him unless he killed deceased, and that it was through fear and to save his own life he struck deceased with an axe.' On this phase of the evidence the Circuit Court was asked to give the following charge: 'If the jury believe from the evidence that the defendant killed Payne under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty.' The Court refused this charge, and the refusal was upheld by the Supreme Court in Error. In delivering judgment, Mr. Justice Coleman said:—

This brings up for consideration the question: What is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty, when placed under such circumstances? The fact that the defendant had been in the employment of Buckhalter is no

excuse. The command of a superior to an inferior, of a parent to a child, of a master to a servant, of a principal to his agent, will not justify a criminal act done in pursuance of such an act. (1 Bish. Crim. Law, s. 355; *Reese v. State*, 73 Ala. 418; Bl. Com. s. 27.) In a learned discussion of the question to be found in *Com. v. Neal*, 1 Lead. Crim. Cas. 81, and note, p. 91, by Bonnett and Heard, it is declared that 'for certain crimes the wife is responsible, although committed under the compulsion of her husband. Such are murder,' &c. To the same effect is the text in 14 Am. & Eng. Enc. Law, 649, and this Court gave sanction to the rule in *Bibb v. State*, 95 Ala. 31.

In Ohio a contrary rule prevails in regard to the wife. (*Davis v. State*, 15 Ohio, 72.) In Arkansas there is a statute specially exempting married women from liability when 'acting under the threats, commands, or coercion of their husbands': but it was held under this Act there was no presumption in favour of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats, or commands. (*Edwards v. State*, 27 Ark. 493, reported by Green in 1 Crim. Law, 741.)

In the case of *Beal v. State*, 72 Ga. 200, and also in the case of *People v. Miller*, 66 Cal. 468, the question arose upon the sufficiency of the testimony of a witness to authorise a conviction for a felony, it being contended that the witness was an accomplice. In both cases the witness was under fourteen years of age. It was held that if the witness acted under threats and compulsion he was not an accomplice. The defendants were convicted in both cases.

The learned judge referred to *Regina v. Crutchley*, 5 C. & P. 133; 1 Hawk. P. C. 28, s. 26; 1 Hale, P. C. c. 8, pp. 49-51: 4 Black. Com. s. 30; East, P. C. 294; and *Regina v. Tyler*, 8 C. & P. 616, and then proceeded:—

In the case of *Respublica v. McCarty*, 2 Dall. 86, when the defendant was on trial for high treason, the Court uses this language: 'It must be remembered that in the eye of the law nothing will excuse the act of joining an enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage on property.' The same rule in regard to persons charged with treason as that stated in Hale P. C. is declared in Hawkins (vol. i. chap. 17, s. 28, and note), and both authors hold that the question of the practicability of escape is

to be considered, and that if the person thus acting under compulsion continued in the treasonable acts longer than was necessary, the defence *pro timore mortis* will not be available. This principle finds further support in the case of *U. S. v. Greiner*, tried for treason, reported in 4 Phila. 396 in the following language: 'The only force which excuses on the grounds of compulsion is force upon the person, and present fear of death, which force and fear must continue during all the time of military service; and that it is incumbent in such a case who makes force his defence to show an actual force, and that he quitted the service as soon as he could.' 1 Whart. Crim. Law, s. 94, under the head of 'Persons under Compulsion,' says: 'Compulsion may be viewed in two aspects: (1) When the immediate agent is physically forced to do the injury—as when his hand is seized by a person of superior strength, and is used against his will to strike a blow, in which case no guilt attaches to the person so coerced; (2) when the force applied is that of authority or fear. Thus when a person, not intending wrong, is swept along by a party of persons whom he cannot resist, he is not responsible if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm, if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence. Thus it is a defence to an indictment for treason that the defendant was acting in obedience to a *de facto* Government, or to such concurring and overbearing sense of the community in which he resided as to imperil his life in case of dissent.' In section 1,803a of the same author (Wharton) it is said: 'No matter what may be the shape compulsion takes, if it affects the person, and be yielded to *bona fide*, it is a legitimate defence.'

We have examined the cases cited by Mr. Wharton to sustain the text, and find them to be cases of treason or fear from the party slain, and in none of them is there a rule different from that declared in the common law authorities cited by us. Bishop, Crim. Law, sections 346-348, treats of the rules of law applicable to acts done under necessity and compulsion. It is here declared 'that always an act done from compulsion or necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life is, in general, to be considered as compelled.' The cases cited to these propositions show the facts to be different from those under consider-

- ation. The case referred to in *Reniger v. Fogossa*, 1 Plow. 19, was where the defendant had thrown overboard a part of his cargo of green wood, during a severe tempest, to save his vessel and the remainder of his cargo. The other (*Regina v. Bamber*, L. R. 5 Q. B. 279) was for the failure to keep up a highway, which the encroachments of the sea had made impossible; and that of *Tate v. State*, 5 Blackf. 73, was also that of a supervisor of a public highway; and the others were cases of treason, to which reference has been made. In section 348 the author cites the rule laid down by Russell, and also of Lord Denman, and in 1 East, P. C., to which reference has already been made. In section 845 the same author (Bishop, 'Crim. Law.' 7th edit.) uses the following language: 'The cases in which a man is clearly justified in taking another's life to save his own are when the other has voluntarily placed himself in the wrong. And *probably*, as we have seen, it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it *would seem*, circumstances in which one is bound even to die for another.' The italics are ours, emphasised to call attention to the fact that the author is careful to content himself more with reference to the authorities which declare these principles of law than an adoption of them as his own. The authorities seem to be conclusive that at common law no man could excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person.

THE QUEBEC BUSINESS TAX.

The following opinion, obtained some time ago from Messrs. Macmaster, Q. C., and Greenshields, Q. C., will be of interest on account of the cases to which reference is made; but we reproduce it without in any way concurring in the conclusion, the question of the power of the legislature to pass the Act, as it seems to us, having already been settled by the Privy Council in *Bank of Toronto & Lambe* :—

Our opinion is asked by a committee of the citizens of Montreal, acting on behalf of a large number of manufacturers and traders, as to the validity of "an act respecting certain licenses" (55 and 56 Victoria, cap. 10), obliging manufacturers and traders, on or before the first of October in each year, to take out a license for the transaction of their business, and to pay in each

case a specified sum of money therefor, under pain, in default, of penalty and imprisonment.

In determining this question, it is not for us to consider whether the legislation in question is wise or unwise, necessary or unnecessary, reasonable or oppressive. These are questions for the legislator and the taxpayer, which do not fall within the domain of legal enquiry.

That Parliament is supreme is a common saying; but it has reference to countries where there is but one parliament. In Canada we have a division of legislative power between the Federal or Dominion Parliament, and the Legislatures of the several provinces. Each of these law-making bodies is supreme within its own jurisdiction, and when the enquiry arises as to whether any piece of legislation has been competently enacted or not, the first question is whether the principal subject matter and purpose of the act fall within the jurisdiction of the enacting body.

Parliament or the legislature is therefore only supreme in Canada when the subject and objects of its enactment fall within its own jurisdiction.

There are some subjects in respect of which the Parliament of Canada and the Legislatures of the provinces have concurrent power; but it is not necessary to consider these at present.

Our statutory constitution is the British North America Act of 1867, enacted by the Imperial Parliament, and declared in the preamble to be "a constitution similar in principle to that of the United Kingdom." In truth, our constitution being federal in principle, and not legislative like that of Great Britain and Ireland, is entirely dissimilar in respect of legislation to that of Great Britain, so much so that Mr. Dicey, in his celebrated work on "The Law of the Constitution," has characterized the prefatory statement in the preamble of the British North America Act as an instance of "official mendacity."

Our constitution resembles that of Great Britain more in the unwritten law of the constitution than in its statutory enactments.

By sections 91 and 92 of the British North America Act, called for convenience the Confederation Act, a distribution of legislative powers is made between the Parliament of Canada and the Legislatures of the provinces.

To the Canadian Parliament is assigned by section 91 plenary power to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the provinces. Then "for greater certainty, but not so as to restrict the generality of the powers so conferred upon the Parliament of Canada, it is expressly declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to" certain specified enumerated classes of subjects, among others "The Regulation of Trade and Commerce," "Postal Service," "Militia," Banking," "Currency and Coinage."

Familiar instances are given, and in respect of all such matters the Parliament of Canada has, notwithstanding anything in the Confederation Act, exclusive legislative authority, and if the subject matter and purpose of the legislation falls under the description of anyone of those headings, the Legislature of the province has not a vestige of legislative authority over it.

The legislature of Quebec, therefore, could not impose one cent's duty or tax on a bushel of beans going out or coming into the province, could not authorize the raising of a corporal's guard of soldiers wearing the Queen's uniform, and could not issue paper money or metal coin to the value of five cents. But while this is so, it will be found that the powers of legislation vested in the provinces are large and exceedingly important.

The province may, by section 92 of the British North America act, exclusively make laws in relation to matters coming within the classes following:—"Direct taxation in the province in order to the raising of a revenue for provincial purposes," "the borrowing of money on the sole credit of the province," "municipal institutions in the province," "shop, saloon, tavern, auctioneer and other licenses. in order to the raising of a revenue for provincial, local or municipal purposes," "the solemnization of marriage in the province," "property and civil rights in the province," "and generally all matters of merely local or private nature in the province." The legislature of Quebec could, therefore, repeal the Civil Code, and substitute for it the laws of the Medes and Persians, in so far as these laws concern property and civil rights. It cannot issue a penny piece of current coin, but it can sell the credit of the province—while the credit is saleable—to an extent sufficient to bankrupt the exchequer; and, though it cannot tax the incoming bushel of beans, it has,

in fact, been judicially held on the highest authority that it can tax millions of money that never ventured across our boundaries, if the financial institution controlling these funds has an agency doing business within our confines. It may exclusively make laws in reference to "municipal institutions," and that apparently harmless expression, popularly associated with township and county government, has been judicially interpreted to embrace an *imperium in imperio* of wide dimensions. In virtue of these words, the province can competently authorize a city to say when its taverns shall be closed and opened, when the billiardist must put down his cue, and it is an open question whether it could not enact the hours for closing theatres and commencing divine service. It may make police regulations, and though it cannot uniform a single soldier under the colors of the Queen, it may engage an army as large as the Tzar's to enforce these regulations.

Saving the office of lieutenant-governor, who is an integral part of the Legislature, representing there the Queen and the Federal authority, it can amend its own constitution and, possibly, abolish itself, or put the Legislative Council and Assembly in commission for a number of years. We will not go so far as to say that it could appoint an official liquidator for provincial affairs, for under the British system there must be a Government, and "the Queen's Government must be carried on," come what will.

Saving the restriction as to the office of Lieutenant-Governor, it could substitute for the present provincial constitution one exactly similar in terms to that of the Bulgarian Sobrange.

No one can therefore doubt that the powers of the local Legislature are large and important.

The Judicial Committee of the Privy Council has tersely defined "the true character and position of the provincial Legislatures" in the case of Hodge and the Queen, (Law reports, 9 Appeal Cases 132) as follows:—

"They are in no sense delegates of, or acting under any mandate from, the Imperial Parliament. When the British North America act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed

and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have, under like circumstances, to confide to a municipal institution or body, of its own creation, authority to make by-laws or resolutions as to the subjects specified in the enactments, and with the object of carrying the enactment into operation and effect."

The Judicial Committee has also put down a rule or method for determining whether legislation falls under section 91 (enumerating the powers of the federal Parliament) or under section 92 (enumerating the powers of the Local Legislatures).

"The first question is whether the act impeached in the present appeal (providing that fire insurance policies in Ontario should be subject to certain statutory conditions) falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the provinces; for if it does not it can be of no validity, and no other question would then arise. It is only when an act of the provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz, whether, notwithstanding this is so, the subject of the act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial Legislature is, or is not, thereby overborne." (*Citizens Insurance Co. v. Parsons*, Law Reports, 7 Appeal Cases 96 et seq.)

Let us apply that test to this case. Admitting for the moment that the subject matter of the legislation here *prima facie* falls within the sub-section of section 92, which permits the local Legislature exclusively to make laws in relation to "shop, tavern, saloon, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes," does it also fall within one of the enumerated classes of subjects in section 91, and is the power of the provincial Legislature thereby overborne? Does the provincial enactment in this case contravene the power not merely vested in the Parliament of Canada, but declared to be vested "exclusively," notwithstanding anything in the act, to legislate in respect to "the regulation of trade and commerce?" Can the Legislature of Quebec, consistently with the existence of exclusive power in the Parliament of Canada to legislate in respect to trade and commerce, say to a trader or manufacturer, doing business in the province of Quebec, "You must pay an annual license fee of \$50 or \$100 per year on your business as a trader or manufacturer, and if you do not, you will be fined and sent to jail for one month?" If it may do so it may increase the fee, penalty or imprisonment by twenty-fold or one hundred-fold.

What would be the effect if the Legislatures of all the provinces imposed at the same time a direct tax upon the banks similar to that imposed and collected in Quebec? The same capital would be subject to taxation seven times, once in each province.

Is the existence of such a power in the Legislature consistent with the existence of an exclusive power in the Dominion Parliament to regulate trade and commerce? If it is, a time may come when the exclusive authority of the Dominion Parliament would be reduced to a fiction, when there would be no trade or commerce left to regulate. It is no answer to this to say that it is not to be assumed that the Legislature would tax trade and commerce out of existence, for, if it has the power to levy the tax it can make the levy small or large according to its caprice or necessities.

The real question is not whether it may tax moderately or excessively, wisely or unwisely, but whether it can tax trade and commerce indefinitely, consistently with the regulating power of the Dominion Parliament. If it can, Federal power over trade and commerce is reduced to a shadow.

Suppose that each of the provinces taxed the business of manufacturers and traders to the verge of annihilation and that the Dominion Parliament, in order to preserve the nation from becoming a purely pastoral country, passed an act regulating trade and commerce throughout the Dominion, and providing that the business of a trader or of a manufacturer should be exempt from taxation of every kind, or that a bounty should be paid to every person engaging in the business of manufacturing and trading, such act not touching in any way the rights of the provincial legislatures to tax property and all persons rateably and equally within the provinces, would such an act be *ultra vires* of the Federal Parliament? We think not. And if not, what would become of the License act in question? The supposed Federal act and the present License act could not exist concurrently. It is no answer to say that the Dominion Parliament has not passed such an act. The real question is, are the Federal powers transgressed now?

Regard must be had to the true confines of legislative jurisdiction between the legislature and parliament, according to the true intent and meaning of the imperial statute, whether colonial legislation, federal or provincial, may have supervened or not.

In like manner the Federal Parliament must not transgress the domain of the Provincial Legislature.

If, for example, the Parliament of Canada should enact that marriage throughout the Dominion of Canada might be solemnized "by jumping a broomstick," provided a fee of \$50 were first paid to a collector of federal revenue, such legislation would be *ultra vires* as a transgression of the exclusive power of the local Legislatures over "the solemnization of marriage," and as not being an enactment coming within the general power vested in Parliament to legislate in respect to "the peace, order and good government" of the country.

We have given extreme instances of legislation in order to illustrate principles that underlie the distribution of legislative power in our constitution, and the better to test their application. We have not failed to give due consideration to the cases that have already been decided in Canada and in England upon the construction of the two sections 91 and 92 of the British North America Act. We have not overlooked the decisions of the Privy Council in the cases of Parsons and the Citizens Insurance company; the Attorney General of Quebec and the Queen Insurance company; the Attorney General of Quebec and Reid; Russell and the Queen; the Bank of Toronto and Lambe, Hodge and the Queen, and other cases in the Privy Council and in our own Supreme Court.

We note that in one of the Privy Council cases their lordships observed that :

"Subjects which in one aspect, and for one purpose, fall within section 92, may, in another aspect, and for another purpose, fall within section 91."

And in another case their lordships observed :

"The two sections must be read together, and the language of the one interpreted, and where necessary, modified by that of the other. In performance of this difficult duty it will be a wise course for those on whom it is thrown to decide each case which arises as best they can; without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular case in hand."

Upon this head, assuming *prima facie* that the Quebec License Act falls within the sub-section permitting the local legislature to make laws in respect of licensees for the raising of a revenue for provincial purposes, we incline to the view that the enactment now under consideration is a transgression of the powers exclusively and absolutely vested in the Federal Parliament relating to "the regulation of trade and commerce."

But can it be said that the provision requiring manufacturers and traders to take out a license, under pain of penalty or imprisonment, comes properly within sub-section of section 92, which authorizes the legislatures to make laws in respect of "shop, saloon, tavern, auctioneer and other licenses." We are of opinion that the license upon traders and manufacturers as provided for in the local statute, does not fairly come within the class of licenses referred to in the words "shop, tavern, saloon, auctioneer and other licenses." The expression "other licenses" in this sentence, it appears to us, means "other licenses" of the same class or the same kind (*ejusdem generis*). The words "other licenses" in the statute must have been used with reference to what could have been reasonably contemplated at the time of their enactment, and if it was intended that the legislature could issue licenses for any purpose, why was there any specification of a class of licenses for shops, taverns, saloons and auctioneers? If it was intended to confer upon the local Legislature the right to tax *ad infinitum*, the Imperial Parliament would have expressed its intention in clearer terms.

We find it difficult to conceive that when the Imperial Parliament restricted the legislatures to "direct taxation," and gave the most unlimited powers of taxation to the Federal Parliament, it could also have intended that the restriction could be avoided by the adoption of a system of discriminating imposts in the form of, and under the name of, licenses.

In rendering judgment in the Supreme Court of Canada, in the case of *Severn v. The Queen*, 2 Can. S.C.R. 97, Chief Justice Richards said :—

"Looking at the state of things existing in the provinces at the time of passing the British North America act and the legislation then in force in the different provinces on the subject, and the general scope and object of Confederation then about to take place, I think it was not intended by the words "other licenses" to enlarge the powers referred to beyond shop, saloon and tavern licenses in the direction of licenses to affect the general purposes of trade and commerce and the levying of indirect taxes, but rather to limit them to the licenses which might be required for objects which were merely municipal or local in their character."

Mr. Justice Fournier, in this case, said :

"Without attaching more importance than is necessary to the application of the rule *ejusdem generis*, is it not more logical to suppose that the Imperial legislature, finding already in some of the laws these licenses treated as of the same kind as other licenses, did likewise, and dealt with them as belonging to the one class ; and, therefore, should we not apply,

in construing this 9th paragraph, the rule of *ejusdem generis*? Otherwise we must come to the conclusion that the insertion of the word 'auctioneer,' which, no doubt, was put in to give the local government a further source of revenue, would have the effect of giving to the local legislature an unlimited power to tax by licenses. This cannot have been the intention of the Imperial Parliament. They cannot, by the insertion of that word, have made a provision which would have the effect of destroying the financial system of both the Dominion and the provinces established by the constitution. The intention was, no doubt, that they should have a limited signification, in accordance with the distinct powers so carefully allotted to the Federal and local governments.

"Moreover, I am far from admitting that the word 'other,' coming immediately after an enumeration, can always have that broad meaning. On the contrary, I am of opinion that it should nearly always be accepted in a restricted sense, and that the cases in which its signification is absolute and unlimited are exceptional."

In the same case Mr. Justice Taschereau stated :—

"From what I have read and heard, I think there is no difficulty in assuming that the tax imposed upon the brewer selling by wholesale in the present case is an indirect tax, and should not be further pressed against the defendant, Severn."

The Judicial Committee of the Privy Council expressly held in the case of the *Bank of Toronto & Lambe*, L. R., 12 App. Cas., 575, that a tax upon a bank, computable with reference to its paid-up capital and number of agencies in the province of Quebec, is a direct tax competently imposed by the Legislature. "This bank," said their lordships, "is found to be carrying on business there, and on that ground alone, it is taxed. . . . The bank itself is directly ordered to pay a sum of money." But in that case their lordships were careful to observe with reference to the Ontario tax on brewers :—

"In Severn's case (2 Canada Sup. Ct. Rep. 70) the tax in question was one for licences, which, by a law of the Legislature of Ontario, were required to be taken for dealing in liquors. The Supreme Court held the law to be *ultra vires*, mainly on the grounds that such licences did not fall within class 9 of section 92, and that they were in conflict with the powers of Parliament under class 2 of section 91. It is true that all the judges expressed opinions that the tax, being a licence duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question (i.e., in the *Bank of Toronto and Lambe*) is not either in substance or in form a licence duty, further examination on that point is unnecessary."

It therefore appears that, in deciding the *Toronto Bank & Lambe*, their lordships did not pass upon that aspect of *Severn & The Queen* that has reference to the "license duty." They were

dealing with a "direct tax," and not with a "license duty." Their lordships, doubtless, purposely abstained from dealing with the question of how far the local legislature can competently impose taxes by "license duty" in adherence to the rule put down in *Parsons & The Queen Insurance Company*, as follows:

"Sections 91 and 92 of the British North America act, 1867, must, in regard to the classes of subjects generally described in section 91, be read together, and the language of the one interpreted, and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain, and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the statute."

Their lordships have left themselves untrammelled by the *Bank of Toronto & Lambe* to consider the question submitted to us for opinion.

Since the decision of the Judicial Committee in the *Bank of Toronto & Lambe*, in 1887, a most important judgment has been rendered in the United States—*Leloup v. Port of Mobile*, (126 U. S. Supreme Ct. Reps. 640), in which it was decided that the business of the Western Union Telegraph company could not be taxed under an enactment of the state of Alabama on the ground that "telegraphic communications are commerce," and the tax in this instance fell not upon the company's property in the state, but on the business throughout the United States, and therefore transgressed the provisions of the constitution, which vested Congress with power to "regulate commerce with foreign nations and among the states." In this important decision the judgment previously rendered in 1827 by Chief Justice Marshall for the Supreme Court in the case of *Brown v. The State of Maryland* (12 Wheaton, 419), and the judgment rendered by Chief Justice Taney in the case of *Almy v. California* (24 Howard, 169), were reviewed and approved.

In *Brown v. State of Maryland*, it was laid down as law, which has been since consistently followed in the United States, that the "Act of a state legislature requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale or package, etc., to take out a license, for which they shall pay \$50, and, in case of neglect or refusal, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the constitution of the United States which declares that "no state shall, without the consent of

Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several states and with the Indian tribes."

In *Almy v. State of California* (24 Howard, 169) it was decided that a state stamp tax on bills of lading was void.

The decision in the recent case of *Leloup v. The Port of Mobile* followed these cases, the court being unanimous. Mr. Justice Bradley, in delivering judgment said :—

"Can a state prohibit such a company (the Western Union Telegraph company) from doing such a business within its jurisdiction unless it pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit such business altogether. We are not prepared to say that this can be done. But it is urged that a portion of the Telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company...In our opinion such a construction of the constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress...We may here repeat what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state, as the property of other citizens is taxed, nor from regulating matters of local concern, which may incidentally affect commerce, such as wharfage, pilotage and the like."

We have cited largely from this important case, as it has been decided since the *Bank of Toronto & Lambe* in the Privy Council, and as the reasons for the decision are weighty and most convincing.

The people of the United States have had an experience of Federal constitution for over one hundred years, and the opinions of the judges of their Supreme Court unanimously expressed, as in the *Leloup* case, are entitled to the highest consideration.

The decisions of the Judicial Committee of the Privy Council and of our own Supreme Court of Canada are binding authorities

on us, but neither court would disregard the powerful reasoning of the Supreme Court of the United States in the like or similar circumstances.

The taxing power of a state of the American Union is greater than that of a Canadian province, and if a state tax upon business is *ultra vires* there, *a fortiori* it would be here.

We think that the case of the *Bank of Toronto & Lambe*, which their lordships observed was a case of "great constitutional importance," is distinguishable from the case submitted for opinion. A great constitutional question is involved in this case as well as in that. The tax in their case was direct; here it is a tax by license. The official report of the argument before the Privy Council shows that the important cases of *Brown v. State of Maryland*, and *Almy v. California*, adverted to by us, were not cited. The *Leloup* case was not cited because it was not then decided.

Our opinion does not involve any curtailment of the legislative power of the province to impose "direct taxes" where it can competently impose such taxes, but, on the contrary, the whole field of direct taxation in the province is not trespassed upon. The distinction between a "license duty" and a "direct tax" has not yet been made by the Judicial Committee. The last word upon that subject has not been said.

In our opinion the Quebec statute of 1892, imposing the license in question is *ultra vires* of the Legislature, upon the true construction of the British-North America act of 1867.

(Signed)

DONALD MACMASTER.

J. N. GREENSHIELDS.

Montreal, November 26, 1892.

NEW PUBLICATION.

"LE DROIT PAROISSIAL," by P. B. Mignault, Esq., Q.C. Montreal: Beauchemin & Fils, publishers.

The present work, comprising nearly 700 pages, is the first that has appeared in this province which treats fully the subject of parochial law. The work published by the late Mr. Justice Beaudry, "*Le Code des Curés*," forms an interesting introduction to the subject, but since its appearance several cases of importance have come before the courts which have added largely to our knowledge of this branch of law.

Mr. Mignault, Q.C., who has already made his mark as a legal author in his valuable commentary on the Code of Procedure and his Manual of Parliamentary Law, has treated the subject of parochial law with his customary clearness and ability. It may be observed that he discusses the subject with respect only to the Catholic parish, which in this province is governed by a special code of laws, many of them unwritten and founded on immemorial usage.

Mr. Mignault has divided his work into four parts in what seems to be the natural classification. Beginning by the mission, which in this province is generally understood to be a settlement which has not yet been raised to the rank of parish, the author treats successively of the religious and civil parish, showing the manner in which each is called into existence.

The parish being erected, the next question is: How is it governed? Four elements share in this government: the bishop, the *curé*, the *fabrique* and the parishioners. To define the powers of each so as to prevent clashing, is no doubt a very delicate question, and therein chiefly lies the extreme intricacy of our parochial law. This part of Mr. Mignault's work comprises some 300 pages.

The third part treats of parochial property and incidentally of the building of churches and of the administration of cemeteries. Here the author had merely to explain a written law, the subject matter being governed by statutes of a most minute character.

The fourth part of Mr. Mignault's book contains some statutory provisions with respect to the maintenance of order in churches, etc.

While merely a law book—and the author is very careful to explain that it has no other character, controversy of a non-legal nature being rigorously excluded—Mr. Mignault's new work contains much historical and statistical information. We would merely refer to the list of parishes which have no *fabrique* and to the inquiry as to the origin of the *fabrique* itself.

An appendix to the work gives a large number of formulas as well as the text of chapter ix. of the Consolidated Statutes for the Province of Quebec.

The printing and binding have been executed in a satisfactory manner, the work being presented in a form which adapts it to the library of the ecclesiastic as well as to the shelf of the practitioner.

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THE BEHRING SEA ARBITRATION.

The result of the Behring Sea dispute is worthy of the means employed to settle it. It is based upon the soundest principles of international law, and is in accordance with the views expressed by all competent authorities on the subject. Establishing, as it does, 'the freedom of the sea,' it places the comity of nations upon a firmer and broader foundation and it constitutes another historic precedent for the settlement of international questions by rational and peaceful means. 'Full, perfect, and final'—to quote the words of the treaty—the award of the arbitrators may not be, inasmuch as circumstances are almost certain to arise which will render it necessary for some judicial interpretation to be placed upon the rules which have been framed with the object of preventing the extinction of the seal and of enabling Indians 'not in the employment of other persons' to carry on their fishing operations in the way hitherto practised by them; but this want of perfection in the regulations does not affect the extremely satisfactory character of the decision of the arbitrators on the broad issues of the case. The chief claim of Great Britain, made not only in her own interests but in those of other nations, has been fully recognised, the essence of the award being an embodiment of 'the great principle lying at the root of the matter—the freedom of the sea'—to use the words in which the Attorney-General summed up the matter. The simple origin of the dispute, concerning which so much erudition and ingenuity have been expended, was the seizure by the United States of a British ship engaged in fur-seal fishing seventy miles from the shore, the United States contending that they possessed exclusive

jurisdiction over the Behring Sea. No doubt, in resisting this contention, Great Britain had a winning case, but none the less are Sir Charles Russell and Sir Richard Webster entitled to the praise of the public for the masterly fashion in which they did their work in Paris, and to the gratitude of the profession for having maintained so worthily, in the presence of eminent foreign jurists, the highest traditions of the English Bar. It is a matter for sincere congratulation that two men whose political opinions have absolutely nothing in common, and whose forensic conflicts have sometimes been fierce, should, when the interests of this country are concerned, join forces with readiness and ease, and conduct a complicated case in perfect unison. The manner in which the two leaders of the Bar presented Great Britain's claims has added not a little to the annals of the profession, of which for some years they have been most distinguished ornaments. The incisiveness and eloquence with which the Attorney-General addressed the Court of Arbitration in a speech that occupied ten days have increased even his brilliant reputation as an advocate and orator, while not less worthy of admiration were the profound learning and keen reasoning power displayed by his predecessor in office in combating the ingenious arguments of the distinguished counsel for the United States. It cannot fail to be gratifying to the profession to know that the persons engaged in the peaceful settlement of the Behring Sea dispute were, for the most part, lawyers—that to the legal profession belongs the honour of being most closely connected with an event which is universally recognised as an important step towards the general adoption of the principle of international arbitration. Lawyers, indeed, possess a special interest in all advances towards this great consummation. The spirit of law is utterly opposed to war. 'The flinty and steel couch of war' can never be the seat of justice, since the battle is to the strong and not necessarily to the just. Arbitration is the triumph of law, and the progress of the one must mean the ennobling of the other. The position of law officer must inevitably acquire additional importance if the practice of submitting international questions to Courts of Arbitration grows. The lawyer will, in some measure, supplant the soldier, the man of words succeed the man of blows; and although the black gown is never likely to catch the popular fancy as the red coat does, yet it is not unsafe to predict that when the conspicuous part which lawyers

have played, and must continue to play, in the progress of international arbitration has been fully realised by the masses, whatever want of appreciation of the legal profession may still linger among them will disappear and its honourable traditions and important functions be universally acknowledged.—*Law Journal* (London.)

COURT OF APPEAL ABSTRACT.

Procédure—Procureur-Général—Poursuites contre des corporations qui excèdent leurs pouvoirs—Désistement—Mandamus—Intervention—Suppression d'une rue—Qualité pour s'en plaindre—Articles 154, 997, C. P. C.

Jugé:—1. Le procureur général peut, sous l'article 997 du code de procédure civile, permettre l'usage de son nom et de sa qualité de procureur-général pour des poursuites de la nature de celles énumérées en cet article, mais il est le seul juge de l'opportunité ou de l'inopportunité de la procédure et de la question de savoir s'il convient ou non d'intervenir.

2. Même dans le cas où le procureur général refuserait, sans cause valide apparente, d'intervenir et de prêter son nom à la poursuite, les tribunaux ne peuvent pas le forcer de le faire.

3. Le procureur-général est toujours libre de se désister d'une semblable poursuite et de retirer l'autorisation de se servir de son nom.

4. Il n'y a pas de mandamus contre la couronne.

5. L'intervention n'est qu'un appendice de l'action principale, et son sort est liée fatalement à celle-ci en ce sens que si la demande a été irrégulièrement formée soit qu'elle ne remplisse pas les formalités voulues pour la validité des exploits, soit que les règles de la compétence aient été méconnues, soit encore qu'elle soit accueillie par une fin de non recevoir tirée du défaut de qualité du demandeur, d'autorisation, etc., l'intervention tombe avec l'action principale, quel que soit d'ailleurs le but de cette intervention.

6. Des propriétaires riverains qui ont été expropriés de tout leur terrain sur une rue et qui ont reçu, en sus du prix du terrain et des constructions, une somme fixe pour leur tenir lieu de tout dommage leur résultant de l'expropriation, n'ont pas un intérêt suffisant pour se plaindre de la suppression de cette rue.—*Atlantic and North West Railway Co. & Turcotte, & La cité de Montréal*, Montréal, Baby, Bossé, Blanchet, Hall, Wurtele, JJ., 23 décembre 1892.

SUPERIOR COURT ABSTRACT.

Procédure—Contestation d'élection municipale—Cumul.

Jugé :—Qu'on ne peut par un seul et même bref de *quo warranto* demander l'annulation de l'élection de plusieurs conseillers municipaux.

Que dans le cas d'un tel cumul, il sera ordonné au demandeur de déclarer contre lequel des défendeurs il entend procéder, et que son action sera renvoyée quant aux autres défendeurs.—*Bourbonnais v. Filiatrault et al.*, Montréal, Mathieu, J., 20 octobre 1892.

Prohibition—Dépôt—Déchéance—Art. 1074, § 5, S. R. P. Q.

Jugé :—Que l'article 1074, § 5, S. R. P. Q., ne prononçant aucune déchéance ou nullité des procédures sur un bref de prohibition, pour le défaut du requérant de déposer préalablement la somme requise par cet article pour garantir le paiement des frais de la partie adverse, ce dépôt pourra, avec le consentement du tribunal, être fait par le requérant subséquemment à l'émanation du bref, sur paiement des frais occasionnés par son défaut.—*Paquette & Desnoyers, & Lambe*, Montréal, de Lorimier, J., 19 août 1892.

Procedure—Examination of party—Art. 251a, C. C. P.

Held :—Where the defendant, before the inscription of the case for *enquête*, has been served with a subpoena to appear for examination on a day named therein, it must be presumed that it was the plaintiff's intention to examine defendant under the provisions of Art. 251a, C. C. P., before proceeding with his *enquête* under the inscription for *enquête* filed by him two days later. The defendant, therefore, is not dispensed from attendance in obedience to the subpoena, by the fact that he has moved to dismiss the inscription for *enquête*.—*Polette v. Brown*, S. C., Montreal, Tait, J., November 4, 1892.

Procedure—Alien—Summons—Art. 27, C. C.

Held :—Where an alien, not resident in the province of Quebec, is sued in its courts, for the fulfilment of an obligation contracted by him in a foreign country, the question is not one of jurisdiction but of due service of process, and if the defendant appears and does not attack the service made upon him by exception to the form he must be held to be properly before the Court.—*Baxter v. Sterling et al.*, Montreal, Wurtele, J., Sept. 19, 1892.

Lessor and lessee—Saisie-gagerie where no rent is due.

Held :—Where the lessee is removing or has removed his effects from the leased premises, the lessor has a right to issue a *saisie-gagerie* to preserve his *gage* whether any rent be actually due at the time or not.—*Dufaux et vir v. Morris*, S. C., Montreal, Davidson, J., January 29, 1892.

Hypothèque—Enregistrement—O. C. 2098—Variante entre versions française et anglaise.

Jugé :—L'effet de l'enregistrement du titre de l'acquéreur fait avant celui du titre de son auteur n'est que suspensif; l'enregistrement subséquent de ce dernier titre donne à celui de l'acquéreur son plein et entier effet, même à l'encontre des droits de l'auteur dont le titre n'a été enregistré que plus de trente jours après sa date.

Dans l'espèce, le demandeur ayant enregistré l'acte d'échange lui donnant la garantie sur les lots possédés par les défendeurs, un an après l'enregistrement de l'acquisition des dits lots par ces derniers, lui dit demandeur n'avait pas sur les dits lots, pour la dite garantie, une hypothèque qu'il put invoquer contre les défendeurs. (Andrews, J., diss.) *Sylvain v. Labbé et al.*, C. R., Québec, Casault, Routhier, Andrews, JJ., 30 sept. 1892.

Registration—Art. 2098, C. C.

Held :—The effect of article 2098 of the Civil Code is simply to suspend the effect of the registration of a real right granted by the acquirer of an immovable so long as the title of such acquirer has not been registered, but when the suspensive condition is fulfilled and the title of the acquirer registered, the priority as between real rights granted by him is governed by Art. 2130, C. C., and regulated by priority of registration. *Huet dit Dulude v. Laporte dit Denis, N. J. Laporte dit Denis*, collocated creditor, & *Alex. Laporte dit Denis*, creditor contestant, Montreal, Doherty, J., June 14, 1892.

Procedure—Action for rent and resiliation of lease accompanied by saisie-gagerie—Exception to the form.

Held :—An action for rent and revocation of lease, which is accompanied by a *saisie-gagerie*, cannot be dismissed on an exception to the form based solely on alleged irregularities in connection with the seizure.—*Brewster v. Campbell*, Montreal, Davidson, J., February 24, 1892.

COLONIAL TITLES.

The following despatch from the Marquis of Ripon to the Earl of Derby appears in the *Canada Gazette*:—

DOWNING STREET, 15th June, 1893.

MY LORD,—The title of "Honourable" as conferred by the Queen in the Duke of Buckingham's despatch No. 164 of the 24th of July, 1868, upon certain persons in the Dominion of Canada and as appertaining to members of Executive and Legislative Councils in other colonies possessing responsible government, has generally been understood not to run beyond the particular colony, but in these cases Her Majesty has now, on my recommendation, been graciously pleased to approve of its use and recognition throughout Her Dominions.

In the Duke of Buckingham's despatch of the 24th of July, 1868, there was no express confinement of the use of the title within the Dominion of Canada, and you will understand that the persons upon whom it was thereby conferred will enjoy it throughout Her Majesty's Dominions for so long as they may be entitled to it.

I have, etc.,

(Signed,)

RIPON.

Governor General,

etc., etc., etc.

LAWYERS AND MARRIAGE.

Marriage tends to get later and later, as the Registrar-General tells us. People who twenty years ago married at twenty-five, now put it off till thirty-five, and of all classes the latest to marry are lawyers. A doctor is bound to marry. Lady patients do not like an unmarried doctor. Clergymen, too, must marry, for a clergyman's wife is as essential a part of the parish as her husband. Moreover, the persistent worship of curates by young lady devotees is sooner or later fatal to the most determined celibate. A lawyer, professionally speaking, is none the worse for being unmarried. Ambitious men, (and ambition is the besetting sin of lawyers) think themselves very much better without it. A variety of qualifications for getting on in that profession have been enumerated,—influential connections, "devil-ling," writing a book, and not possessing a shilling,—but marriage

is not numbered among them, unless it be the pseudo marriage of the song, with a solicitor's "ugly elderly daughter." Hence marriage to an unrisen lawyer is a luxury, and an expensive one. We hear much of the uncertainty of the law, but its uncertainty as a source of income is undeniable. When Lord Bacon spoke about giving hostages to fortune, he was probably thinking of his own profession. Certainly he did not commit the imprudence of early marriage himself, for he was forty-five before he found the "handsome maiden to my liking," whom he married, and who afterwards incurred his deep displeasure by flirting with his gentleman usher, or whatever else was the "great and just cause" for which he disinherited her. And the "handsome maiden" he took care should be one with a handsome portion too. But Bacon was of a cold nature, and like many others he waited too long. "I'm no for a man marrying," says Mrs. Poyser in "Adam Bede," "before he's old enough to know the difference between a crab and an apple; but he may wait ower long, and then he's like a man that goes past his dinner-time, and he turns his meat ower and ower wi' his fork, and finds fault wi' the victual when the fault's wi' his own inside." There are many men who are predestined old bachelors, like the eminent lawyer mentioned in Sergeant Robinson's Reminiscences, who said "he was born a bachelor, and in that persuasion he intended to remain." Selden, himself a great lawyer, was one of this type. In his "Table Talk," he calls marriage "a desperate thing." "The frogs in *Æsop*," he says, "were extremely wise. They had a great mind to some water, but they would not leap into the well because they knew they could not get out." This is rank misogyny. Even Lord Campbell contemplated a solitary old age with dismay. Over and above professional prudence or ambition, there may be a want of susceptibility on the part of lawyers to the tender passion. Their energies, to put it physiologically, all run to brains, leaving the emotional or sentimental part atrophied. Lawyers, at all events, are credited with hard hearts as well as hard heads. "Gentlemen of your profession," said Mr. Pickwick to Sergeant Snubbin, "see the worse side of human nature. All its disputes, all its ill-will and bad blood, rise up before you." "You must admit," said a doctor, addressing Bobus Smith, Sidney's lawyer brother, "that your profession doesn't make angels of men." "No," replied Bobus; "your profession gives them the first chance of that." On the other

hand, there is a great deal of truth in the saying that a man never settles down to work till he gets married;—ranges himself, as the French say. Lady Hardwicke often humorously laid claim (as she had good right to do) to so much of the merit of Lord Hardwicke's being a good Chancellor, in that his thoughts and attention were never taken from the business of the court by the private concerns of his family, the care of which, the management of his money matters, the settling all accounts with stewards and others, and above all, the education of his children, had been wholly her department and concern, without any interposition of his, further than implicit acquiescence and entire approbation.

If marriage, too, brings responsibility, it furnishes a new incentive. John Scott would never have become Lord Eldon, unless he had run away with "his Newcastle beauty," Miss Surtees. "I have married rashly," he writes; but it is my determination to work hard for the woman I love." This was the right spirit; and work hard he did, getting up at four o'clock to read law, and wrapping his head in wet towels. Yet these laborious days in Cursitor street, when he slipped out at night to Fleet market to get six penny worth of sprats for supper, were among the happiest in his life. His labors were lightened by the constant companionship of his amiable and beautiful wife, who accustomed herself to his hours, and would sit up with him silently watching his studies. "There is nothing," he afterwards said, "does a young lawyer so much good as to be half-starved." When Erskine made his brilliant début in *Rex v. Baillie*, he was asked how he had courage to stand up so boldly against Lord Mansfield. He answered that he thought his little children were plucking his robe, and that he heard them saying, "Now, father, is the time to get us bread." Marriage, too, had a good deal to do with the success of Lord Truro, not to speak of improving the then over-convivial habits of the circuit bar. When Wilde (Lord Truro) joined the Western Circuit, he was an invalid, and travelled with his wife. He rarely dined at the circuit mess, and devoted the entire evening to his briefs. This compelled a corresponding alteration of habits in others; and a popular leader, afterwards a distinguished judge, is reported to have said to him, "I'll tell you what it is, Wilde, you have spoiled the circuit. Before you joined us we lived like gentlemen, sat late at our wine, left our briefs to take care of themselves, and came into

court on a perfect footing of equality. Now all this is at an end, and the assizes are becoming a drudgery and a bore."

Lord Campbell had a poor opinion of lawyers' matrimonial choice. "Generally speaking," he says, "the wives and daughters of lawyers are nothing by any means to boast of. Barristers do not marry their mistresses so frequently as they used to do, but they seldom can produce a woman that a man can take under his arm with any credit." This is certainly a monstrous libel. Lord Campbell might have remembered that the wife of the judge whose decisions he reported, Lord Ellenborough, had been a reigning beauty and a toast; that the wife of his great rival, Lord Lyndhurst, was one of the chief ornaments of London society; that the wife of his friend, Lord Tenterden, was all that a wife could or should be; that it was despair for the death of an amiable and accomplished and too well-beloved wife which had caused Sir Samuel Romilly, in a "horrible dismay of soul," to take his own valuable life; to say nothing of Lady Abinger, Lady Denman, and Lady Hatherley. One of the most pleasing incidents in the life of the late Lord Hatherley is that which illustrates his attachment to his wife:—

Some years before his death Lord Hatherley, having to attend the Queen as Lord Chancellor, was bidden to stay as her Majesty's guest after the business for which he had come was finished. He betrayed some hesitation at this command, and being pressed to explain, told her Majesty that it was the first occasion in his married life on which he had passed twenty-four hours away from Lady Hatherley. The Queen allowed him to depart, and graciously commanded that the next time the Lord Chancellor visited her he should be accompanied by Lady Hatherley.

"Hatherley," said Lord Westbury, "is a mere bundle of virtues without one redeeming vice."—*Law Gazette*.

COLLISION—RE-HEARING.

In the case of *The Cynthia v. The Polynesian*, July 3, 1893, before Sir Francis Jeune, President of the Probate and Admiralty Division, Dr. Raikes, on behalf of the owners of the *Polynesian*, made an application under peculiar circumstances which, in the report of the *London Times* are stated as follows:—Some years ago a collision occurred in the River St. Lawrence between the *Polynesian* and the *Cynthia*. The latter sank, and the Polyne-

sian was considerably damaged. Proceedings were commenced in this country, but before they had proceeded far action was commenced in the Vice-Admiralty Court in Lower Canada, and there the case was tried. The decision of the Canadian Court was that the Polynesian was solely to blame. Her owners proposed to appeal to the Privy Council, but the case was settled on the Polynesian undertaking to pay 50 per cent. of the Cynthia's damage. The action pending in this country was thereupon revived, and the case went to the Registrar and merchants in order that the amount of the damage might be ascertained. The owners of the Cynthia made an affidavit for this purpose, in which they stated that there was no salvage of the wreck; that it was impossible to find anyone to attempt it, and that the underwriters had determined that the abandonment of the wreck was the only prudent course. No doubt that affidavit was *bonâ fide*, and the owners of the Cynthia were under the impression that there would be no salvage. The Registrar consequently made his report on the basis that the vessel was a total loss. On that report the owners of the Polynesian had made payment; but they had quite recently ascertained, first of all by means of the newspapers, that one of the owners of the Cynthia had since undertaken to give something for the wreck as it lay, and for what might be recovered from the cargo. There was no doubt there had since been a substantial salvage. Under these circumstances he applied that the report of the Registrar might be re-opened, if necessary.

The President observed that the report had been made on May 13, 1891, and the money had been paid. Was there any decision showing in these circumstances that the matter could be re-opened?

Dr. Raikes cited the *Franconia* (3 P. D.), the *James Armstrong* (4 L. R., A. and E., 380), and the *Thyatira* (5 Aspinall).

Mr. Butler Aspinall, for the owners of the Cynthia, contended that the Court had no power to re-open the matter, that if such power existed it ought not to be exercised in the present case, and that by agreement between the parties, the owners of the Polynesian were estopped from this application.

In the course of the argument it transpired that the value of the property salvaged was about 160*l*.

The Court refused the application.

The PRESIDENT, in giving judgment, said, I have no real doubt

in this case as to what I ought to do. It was suggested in the first instance that there might be a question whether this fund when recovered might not belong in part to the *Cynthia* and in part to the other vessel, but I am unable to follow that. The real questions appear to me to be—first, whether I have jurisdiction under the circumstances to re-open this matter, and, secondly, whether I ought to do so. On the first point I have the gravest possible doubt whether I have the right to re-open this matter. It is quite true that before the Judicature Act cases have been cited to me where the questions were re-opened, and since the Judicature Act the case of the *Thyatira*, a case bearing a resemblance in some respects to this one, was re-opened, but in that case I don't think it could possibly be contended, and it is quite clear that Sir James Hannen did not think so, that the order was a perfected order. The principle seems to me clear that where an order has been perfected, the power of the Court to deal with it ceases. The question here of course is whether it has been perfected. If ever a proceeding of this kind came to an end, I should say this proceeding had come to an end. The Registrar's report was as long ago as May 13, 1891, money was paid on the strength of it, and distributed amongst the underwriters, and the matter came absolutely to an end, and that being so I should have no jurisdiction to interpose upon the other point. The Registrar had the affidavits of the owners before him, and came to a conclusion. The claim was for 26,000*l.*, 120*l.* for spare propellers, 23*l.* 2*s.* for something else, and the Registrar gave a sum of 20,000*l.* in round figures, and I very much doubt if he had known the facts, as we know them, whether that figure would have been substantially varied. But that is not the question I have to decide; the question I have to decide is whether, seeing the mistake was, in any way, a small one, that it was not discovered or thought of for a considerable time by either the owners of the *Cynthia* or by the owners of the other vessel, I ought to set aside an award made so long ago. Under such circumstances I am clearly of opinion that I ought not, and therefore this motion must be refused with costs.

THE LAW'S DELAY IN ENGLAND AND FRANCE.

A long-suffering Chancery judge had on one occasion an opportunity of commenting, in the presence of Dickens, on the latter's strictures on delays in Chancery. Fixing his eye on the novelist in Court (who, of course, could not answer back), he informed irresponsible writers in general that the true cause of the prolongation of suits in Chancery was to be found in the perverseness of a 'parsimonious public'—who, with a population ten times greater, and litigation increased in proportion, were content to pay only the same number of judges as in the time of Edward III. There seems to be some show of reason in this judicial contention. It is not always mere wickedness of lawyers that causes the prolongation of suits. A good deal of comment has been made in the daily press on the length of the Chancery suit dating from 1740 which was the subject of an order recently. But this was merely a case of revival of a suit long dormant, claimants coming forward to prove their title to a fund in Court. It is not by any means the law's delay which is at the bottom of such proceedings as this. It is rather the exceeding, perhaps the excessive, scrupulousness with which the English law regards the sacredness of title by succession to property. In other countries the fund in Court would long since have escheated to the State as *bona vacantia*, if, indeed, it had not disappeared, with the Court itself and many other things, in a revolution.

In France a Republican constitution and a written code and a prohibition to the judges to legislate do not prevent the institution of suits based on claims dating centuries back. Not unusually, however, means are found of preventing a claimant from establishing his title against the State, which no doubt, must be disheartening to litigants with a turn for antiquarian research. It will be somewhat surprising to those who think everything in France is new to see the decision in the case of *Dame Roussel c. Gouvernement Français (succession Thiéry)* rendered in the Conseil d'Etat in August, 1891. The claim was against the Republic to a fund estimated at 640 millions of francs, dating from 1676—the days of the effulgence of the Roi Soleil.

A Frenchman, one *Sieur Jean Thiéry*, died in Venice in 1676, having among his property the considerable sum of '800,000 écus d'or Venitien à la Croix,' securely invested in the National Bank of Venice at 3 per cent interest. This sum is estimated in pre-

sent money at 9,920,000 francs. He made a will leaving this property to his relatives in France. These persons, however, could not be ascertained, and meanwhile the fund and accruing interest continued to remain for over a century in the custody of the Venetian Republic. In 1791 the Constituent Assembly of France remitted the question of heirship to the Tribunal of the Seine. In 1796, Bonaparte, commending the French troops in Italy, was instructed by the Directory to demand the millions of the Thiéry succession from the Venetian government, and to apply them—temporarily, it is supposed—to replenishing his military chest. Before the demand was complied with, the French troops took possession of Venice and abolished its ancient constitution. They also, it needly hardly be said, took possession of the public funds. On June 6, 1797, an official letter was sent by the Directory to Bonaparte recapitulating their letter of the previous year and adding: 'Tous ces fonds sont entre nos mains, l'Arsenal et la Banque sont en notre pouvoir; et la République Française est en droit d'en disposer selon sa volonté et ses intérêts.'

Although the Republic of St. Mark had vanished, the undaunted claimants to the property of the *de cujus* of 1676 remained, and now proceeded against the French Republic, as possessors of the Thiéry fund reclaimed from Venice. The decision of August, 1891, it is to be supposed, has ended this historic litigation. It is held by the Conseil d'État that the annexation of the Venetian Republic and the seizure of its public funds was an Act of State, giving rise to no recourse by private individuals against the supreme authority of France. 'Ce fait de guerre ne saurait donner ouverture contre l'État française à aucun retour ou action de la part des créanciers des dites caisses.' This, no doubt, is the French way of saying that the Republic can do no wrong.

And so, for Dame Roussel, no debtor no debt. Venice and its liabilities have vanished together. Even lawyers cannot fail to be impressed with a sense of disproportion when they see applied to the once glorious Queen of the Adriatic and bulwark of Europe the every day maxim of the civil law applicable to private mortals, 'Actio personalis moritur cum personâ.'—*Law Journal (London.)*

MR. JUSTICE BLATCHFORD.

Samuel Blatchford, associate justice of the Supreme Court of the United States, died July 7, 1893. The deceased was appointed an associate justice of the Supreme Court of the United States, March 22, 1882, to fill the vacancy caused by the resignation of Justice Hunt. His grandfather, Samuel Blatchford, was an English dissenting minister, who came from Devonshire to the United States in 1795. His father, Richard Milford Blatchford, a native of Stratfield, Conn., was a school teacher, and still later counsel for the bank of the United States.

Samuel Blatchford was born in New York city, March 9, 1820, was educated at a boarding school at Pittsfield, Mass., and at the school of William Forrest, a well known teacher in New York, and at the grammar school of Columbia College. He entered Columbia College at the age of thirteen and was graduated in 1837, at the age of seventeen. He then became private secretary to William H. Seward, who had been elected governor of New York, and held the position until his resignation in 1841, when he was appointed military secretary on the staff of the governor. In the following year he was admitted to the bar, and practiced law in New York with his father and his uncle, E. H. Blatchford, until November, 1845, when he removed to Auburn, and became the law partner of Governor Seward and Christopher Morgan.

In 1854, removing to the city of New York, he formed a co-partnership in connection with Clarence A. Seward and Burr W. Griswold, under the firm name of Blatchford, Seward & Griswold. May 3, 1867, he was appointed district judge of the United States for the Southern District of New York, in the place of Samuel R. Betts, who had resigned. March 4th, following, he was appointed circuit judge of the Second Judicial Circuit in the place of Alexander S. Johnson, deceased. In 1852 he commenced the publication of his series of reports of the Circuit Courts of the United States within the Second Circuit, and published 24 volumes.

As an admiralty judge, justice Blatchford ranked among the foremost in the land. As a patent lawyer he was clear-headed and sensible, determining, among other notable cases, the validity of letters patent for insulating telegraph wires by gutta-percha, and the liability of a common carrier for infringing a patent, when it carried the infringing article, which was to be sold at its

destination for use. Besides these he adjudicated numerous questions in bankruptcy, questions of copyright and libel, the power of the president to cancel a pardon before it had been delivered to the prisoner, the legality of the Brooklyn Bridge as a structure suspended over navigable waters, the validity of a statute of New York discriminating in rates of wharfage in favor of canal boats of the State, and many kindred controversies.

His appointment to the Supreme Bench by president Arthur was received with general approval. Justice Blatchford's accuracy, care, impartiality and firmness were conspicuous.

Chief Justice Fuller, when informed of his death, observed: "Justice Blatchford was a profound lawyer and judge. He was a man of indefatigable industry and of exact method. He was an especially able judge of admiralty and patent law, but was an able all-round jurist. He was greatly beloved by his associates, and the loss the Supreme Court sustains by his death is great."

GENERAL NOTES.

PHOTOGRAPHING THE WHITE CITY.—No man can estimate how much the financial affairs of the World's Exposition have been injured by the mistaken policy of the directors in refusing to allow the scientific and artistic photographers of the world to take negatives of the beautiful buildings of the White City, for the purpose of having them reproduced in the illustrated papers of the world, and by beautiful pictures and kind words making the people of every race not only familiar with the magnificent buildings, but creating a longing within their breasts to attend the Fair and behold its wonders for themselves; but no, the directors would not have it so. Had this been a private enterprise the proprietor would have met Mr. Beach of the *Scientific American* (and all like him) at its gates and welcomed him with heart and hand. The photographers and the illustrated press of the world came to help save from financial ruin the finest and greatest exposition that has ever been upon the earth, and they were kicked from its doors.—*Chicago Legal News*,

REMARKS AFTER VERDICT.—It has frequently been declared of late that the duties of a prosecuting counsel need to be defined, and the statement has been emphasised by the conduct of Mr. Charles Mathews at the conclusion of a murder trial at the Exeter Assizes. The prisoner, who was tried for murdering her illegi-

timate child, was acquitted, but Mr. Mathews was not content to let the matter rest with the verdict of the jury, and proceeded to give an utterly irrelevant account of the dark incidents of the woman's career. He expressed his conviction that 'it should be known' that the prisoner had given birth to three illegitimate children, that she had been charged with causing the death of her second child as well as of her third, and that, being acquitted of the charge of murder, she had been sentenced to fifteen months' imprisonment for concealment of birth. With perfect accuracy Mr. Justice Grantham described Mr. Mathews' observations as 'unusual,' but he made it clear that he thoroughly concurred in them, and that he was in some measure responsible for them, for he stated that he 'was anxious that the statement should be made, so that the prisoner might learn that these facts were known, and that if anything of the kind happened again the verdict of the jury would probably be very different.' These remarks are perilously near the famous verdict, 'Not guilty, but don't do it again.' But they may be strongly objected to on several more important grounds. If trial by jury is to retain its value, neither prosecuting counsel nor judge ought to qualify a verdict of acquittal by any irrelevant references to the prisoner's past. When the jury found the prisoner innocent the trial was at an end, and the counsel for the prosecution was not entitled to address the Court. The circumstances of any particular case may be very suspicious, but in nowise do they justify a serious departure from the elementary principles of our criminal procedure.—*Law Journal (London.)*

SPORT ON THE THAMES.—A curious case of shooting arose on the August Bank Holiday. Thomas Wyborn, paperhanger, of Fulham, went to Craven Steps, Hammersmith, with a shot-gun to seek sport on the river. There, he says, he saw a snipe flying across the river and he fired, and shot four men in a passing boat, one so badly that he lost an eye. They maintain that no bird was flying by, and that he aimed at them. To find a snipe off Hammersmith Bridge on an August Bank Holiday is an event calling for much proof, and to shoot at it when found a deed worthy of a mad ornithologist, and it is not surprising that the sportsman is charged with shooting with intent to murder, and runs great risk, whatever his real intent, of falling within *Regina v. Salmon*, 50 Law J. Rep. M. C. 25; L. R. 6 Q. B. Div. 79.—*Th*

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CURRENT TOPICS.

More than two and a half years ago reference was made in this journal (vol. 14, p. 65) to the extreme inconvenience caused to judges, counsel and others who had business to attend to in the Montreal Court House. On that occasion it was suggested that a short recess in the work of the Courts might be desirable, in order that some of the more difficult parts of the reconstruction might be accomplished without interruption. It was hardly anticipated at that time that after the lapse of thirty months the chaos would be greater than ever. During all this time the necessary work of the Courts has been conducted amidst the greatest confusion. Not only has the public business suffered by the fact that it had to be carried on while extensive alterations were in progress, but the cost of reconstruction has doubtless been largely increased. The judges have been compelled to shift about from room to room, and hold their courts in any hole or corner that chanced to be available from day to day. In the light of the past three years' experience it is clear that it would have been wiser to occupy other premises during the alterations. Even after three successive Long Vacations the access to the edifice at the time of writing is more difficult than ever, and the interior is far, very far, from completion. It would be unsafe to predict that the workmen will be out of the building before the lapse of another year. Fortunately, however, the work has

been accomplished without serious accident, and it may be hoped that the increased accommodation obtained by the additional story will suffice for a good many years to come.

Whether it be due to the condition of the Court House or not, it is certain that legal business has been unusually stagnant during the Vacation. Little or nothing of special interest has come before the Judge in Chambers. For more than thirty years there has not been so dull a Vacation. Apparently, clients as well as lawyers are more out of town now than when the city was only one third the size, and when the proportion of its inhabitants who felt bound to absent themselves during the summer months was comparatively insignificant. The dullness of legal business is all the more remarkable this year, for even in Montreal there has been very little summer weather. It was cold in May and cool in August, and the intervening months brought little that could be described as sultry.

Nevertheless, in spite of midsummer inactivity and Court House alterations, a considerable amount of business is, somehow or other, disposed of during the year. This fact has been recently pressed upon our attention in connection with work upon the reports. The registers of judgments rendered by the Superior Court in 1892 (exclusive of cases in Review) fill six large folio volumes of nearly a thousand pages each, equal to about a dozen printed volumes of six hundred pages each. This little fact shows that a seat on the bench of the Superior Court is not a sinecure.

The judges of the Supreme Court of Canada for a good many years seemed to bear a charmed life, for death touched them not. Chief Justice Richards resigned some years before he passed away, and the place of Mr. Justice Henry in 1888 was the first vacancy created by death.

Now, in quick succession to Chief Justice Ritchie, we have to record the death of Mr. Justice Patterson (July 24). The deceased, Christopher Salmon Patterson, though only appointed a judge of the Supreme Court in 1888, had a long judicial career. He was born in London, England, in 1823, and was called to the bar of Upper Canada in 1851. He was a member of the Law Reform Commission in 1871, and was appointed to the Ontario Court of Appeal in 1874. His career was referred to by the Chancellor of Ontario in these words:—"Since the last session of the Vacation Court the death of Mr. Justice Patterson, of the Supreme Court of Canada, has brought to a close the work of a good judge and a good man. He needs no eulogium from the lips of his judicial brethren, for his life was lived openly so that all could see and value his devotion to the claims of his country and of his fellow-men..... His judgments will live after him, and will supply not a few landmarks for future practitioners and judges. Speaking for myself, I lament the loss of a much-loved friend; but, apart from personal considerations, I now bear testimony to the assiduous and conscientious discharge of public duty which characterized his life as a judge. He was a friend of the student as well as of the solicitor and counsel who practised before him. He spared no pains to discharge that debt which every lawyer owes to his profession, by seeking to conform the practice and principles of jurisprudence to the advancing and developing needs of a more complex civilization. But I need not dwell longer on his merit—I would sum up all in words already used—he was a good judge and a good man."

SUPERIOR COURT ABSTRACT.

Subrogé-tuteur—Action en destitution—Art. 282, C. C.

Action demandant la destitution d'un subrogé-tuteur pour les causes suivantes: 1. Parceque le tuteur avait intenté contre ce subrogé-tuteur une action lui demandant de rendre compte d'un certain nombre de billets; 2. Parceque la mère du subrogé-

tuteur avait à la suggestion de ce dernier, intenté une action contre le dit tuteur; 3. Parceque le défendeur avait refusé de consentir à une licitation volontaire des immeubles de son pupille; 4. Parceque le défendeur était animé de sentiments antipathiques à l'égard de son pupille et avait refusé de remplir les devoirs de sa charge; 5. Parceque le défendeur était sur le point de partir de la province de Québec et de la Puissance du Canada. Le départ projeté du défendeur et ses sentiments antipathiques ne furent pas prouvés, et il fut démontré que les immeubles qu'on voulait faire liciter étaient substitués.

Jugé:—Que les causes de destitution invoqués étaient insuffisantes en loi pour justifier la destitution d'un subrogé-tuteur.—*Fyfe v. Bourdeau, & Fyfe et vir*, Montréal, Ouimet, J., 31 mai 1892.

Procédure—Péremption d'instance—Requête civile.

Jugé:—Que la simple production de la requête civile n'ayant pas, comme l'opposition à jugement, qui est un véritable plaidoyer, l'effet de mettre de côté le jugement dont on se plaint, le défendeur requérant ne sera pas reçu, lorsqu'on n'a pas procédé sur la requête civile pendant plus de trois ans, à demander la péremption de l'action du demandeur, ce dernier ayant déjà un jugement en sa faveur, et que la seule instance qui pourrait être déclarée périmée, c'est la requête civile du défendeur.—*Lavigne et al. v. Dame & Dame*, Montréal, Pagnuelo, J., 16 mai 1892.

Action pour dommages contre un hôtelier qui vend des liqueurs enivrantes à une personne après avoir reçu avis de ne point le faire
—Art. 929 S. R. P. Q.

Jugé:—1. Le recours mentionné à l'article 929 S. R. P. Q., contre un hôtelier qui vend des liqueurs enivrantes à une personne après avoir reçu avis de ne point le faire, ne constitue ni une amende, ni une pénalité, mais un simple droit à des dommages personnels qui peuvent et qui doivent être recouvrés devant les tribunaux ordinaires.

2. Le fait d'avoir, dans une semblable action, allégué que le défendeur avait agi contrairement au statut de Québec, 41 Vic., ch. 3, sec. 96, au lieu de l'article 929 qui remplace cette disposition, ne constitue pas une erreur fatale.—*Willett v. Viens*, Montréal, Jetté, J., 30 juin 1892.

Témoign—Privilège—Frais.

Jugé :—Lorsque les faits dont un témoin dépose sont relatifs à la cause dans laquelle il est examiné, et qu'ils sont articulés de bonne foi et sans malice, il ne saurait y avoir ouverture à un recours en dommages à raison des paroles ainsi prononcées. Cependant, dans l'espèce, le défendeur ayant juré que la demanderesse n'était pas croyable sous serment, et ayant donné, comme base de sa croyance, des motifs mal fondés, et ayant de plus laissé percer une certaine prévention contre la demanderesse, il n'y avait pas lieu d'accorder au défendeur les frais d'action.—*Marquis v. Gaudreau*, Jetté, J., 30 juin 1892.

Liquidateur—Autorisation pour poursuivre—S. R. C. ch. 129, sec. 31.

Jugé :—Le liquidateur d'une compagnie doit être spécialement autorisé à poursuivre une réclamation de cette compagnie, et une autorisation générale de poursuivre le recouvrement de tout l'actif de la compagnie ne suffit pas.—*Freygang et al. v. Daveluy et al.*, Mathieu, J., 18 nov. 1892.

Procédure—Capias—Septuagénnaire—Dommages à une propriété hypothéquée—Articles 800, 801, 805, C. P. C.

Jugé :—1. Le septuagénnaire qui détériore une propriété hypothéquée n'est pas exempt d'arrestation.

2. Les dommages dont il est question en l'article 800 du code de procédure civile, sont des dommages non liquidés; en conséquence le *capias* basé sur cet article ne peut émaner que sur l'ordre d'un juge conformément à l'article 801.—*Ouimet v. Meunier dit Lapierre*, C. S., St-Hyacinthe, Tellier, J., 3 janvier 1893.

Bail—Privilège du locateur.

Jugé :—Lorsqu'un locateur a fait saisir-gager les meubles de son locataire pendant que ce dernier était dans sa maison, le nouveau locateur n'acquiert aucun privilège sur ces meubles au préjudice du saisissant, même si ce dernier ne l'a pas notifié; en conséquence, un bref de saisie-gagerie par droit de suite est inutile et doit être cassé avec dépens.—*Chaussée v. Christin dit St-Amour*, C. C., Montréal, Doherty, J., 13 février 1893.

Huissier—Demande de destitution—Réponse en droit.

Jugé:—Qu'en loi, il est permis de demander la destitution d'un huissier pour malversations ou actes de fraude par lui commis en dehors de l'exercice de sa charge.—*Desmarteau v. Reed*, Montréal, Davidson, J., 6 février 1893.

Dénonciation calomnieuse—Privilege—Témoin.

Le défendeur, dont le magasin avait souffert d'un incendie, après que son témoignage devant les commissaires des incendies fut clos, déclara aux dits commissaires que certains effets avaient disparu de son magasin, pendant que la police en avait la garde, et il consentit que rapport de cette accusation fût fait au chef de police. La preuve démontra que rien ne justifiait cette dénonciation.

Jugé:—Que les déclarations du défendeur devant les commissaires des incendies n'étaient pas privilégiées et que chaque homme de police qui avait participé à la garde du magasin du défendeur, avait droit d'action contre ce dernier à raison de cette accusation.—*Prairie v. Vineberg*, Montréal, Jetté, J., 28 juin 1892.

Procédure—Production de pièces—Art. 103, C. P. C.

Jugé:—Bien que l'article 103, C. P. C., prescrive que jusqu'à ce que les pièces du demandeur aient été produites, le dit demandeur ne peut procéder sur sa demande, le défendeur sera cependant reçu à demander, par motion, à ce qu'il ne soit pas tenu de plaider, et les dépens de cette motion lui seront accordés.—*Haines v. Baxter*, Mathieu, J., Montréal, 8 nov. 1892.

Contrainte par corps—Frais—Discretion de la cour—Articles 2272, 2276, C. C.

Jugé:—1. Un demandeur qui a obtenu un jugement pour injures personnelles, ne peut demander la contrainte par corps pour des frais distracts à son procureur.

2. Les juges, en vertu des termes de l'article 2 du titre 34 de l'ordonnance de 1687, ont un pouvoir discrétionnaire d'accorder ou de refuser la contrainte par corps, ou de fixer l'étendue et la durée de cette contrainte.—*Quenneville v. St-Aubin*, Mathieu, J., Montréal, 2 déc. 1892.

Insurance, Life—Amount payable to wife—Divorce, Effect of.

Held:—Where an insurance is effected upon the life of the husband, the amount whereof is payable to his wife on a date named in the policy or on the previous death of the husband, and the parties are subsequently divorced, the wife ceases to have any claim to the amount of the policy, which reverts to the husband.—*Hart v. Tudor*, Gill, J., Montreal, Dec. 12, 1892.

Absence—Partage—Art. 104, C. C.

Jugé: —Celui qui était absent lorsqu'une succession testamentaire s'est ouverte en sa faveur et en faveur d'autres co-héritiers, et qui est encore absent, doit être écarté du partage des biens de la succession.

2. Dans ce cas, les héritiers présomptifs de l'absent sont sans droit à prétendre concourir au partage pour la part de ce dernier.—*Lawlor v. Lawlor et al.*, Gill, J., Montréal, 26 déc. 1892.

Partnership—Action against secret partner—Art. 1836, C. C.

Held:—Where a person though not a registered member of a firm, must nevertheless be deemed to be a partner by reason of a private agreement involving participation by him in the profits and contribution to the losses of the firm, such person may be sued for a debt of the firm jointly and severally with the registered partners.—*Carter v. Grant*, Taschereau, J., Montreal, Dec. 5, 1892.

Procedure—Service—Person residing at hotel—Art. 57, C. C. P.

Held:—When the defendant resides at a hotel, the servants and employees of the hotel are persons belonging to his family within the meaning of Art. 57, C. C. P., and service effected at the hotel, speaking to an employee, is a good service.—*Bastien v. Kennedy*, Montreal, Doherty, J., June 24, 1892.

Promissory note—Warrantor—Protest.

Held:—A warrantor (*donneur d'aval*) occupies the same position as an endorser, and is discharged by omission to protest. Hence a declaration in an action against a warrantor which does not allege that the note was protested is demurrable.

2. An allegation in the declaration that the defendant acknowledged to owe and promised to pay the amount of the note, is destroyed by an allegation also contained therein, that payment of the note was refused at the time of presentment, and had always since been refused.—*Emard v. Marcille*, Montreal, Wurtele, J., September 19, 1892.

Procédure—Shérif—Honoraires.

Jugé :—Les dispositions de la loi qui accordent au shérif une commission de deux et demie pour cent sont encore en vigueur.—*Lambert v. Larivière*, et *Le dit demandeur*, créancier colloqué, et *La Banque de St-Hyacinthe*, opposante, Montréal, Mathieu, J., 11 juin 1892.

Mariage—Nullité.

Jugé :—Un mariage de deux catholiques mineurs célébré devant un ministre protestant sans l'observation d'aucune des formalités requises par la loi, et notamment sans publication de bans, sera annulé à la demande d'un des époux.—*Valade v. Cousineau*, Montréal, Mathieu, J., 12 novembre 1892.

Procédure—Désistement—Inscription.

Jugé :—1. Un désistement fait sans l'offre de payer les frais, n'en constitue pas moins, de la part de la partie qui le fait, une renonciation aux prétentions qu'elle a émises dans la procédure dont elle se désiste, et un jugement peut ensuite intervenir sur ce désistement et condamner cette partie aux dépens s'il y a lieu. Par conséquent, un tel désistement ne sera pas rejeté du dossier sur motion de la partie adverse.

2. Rien n'empêche qu'un désistement soit mis dans une inscription.

3. L'inscription d'une cause faite devant un juge de la cour supérieure au lieu de l'être devant le tribunal lui-même, est irrégulière.—*Bousquet v. Duquette*, Montréal, Mathieu, J., 5 novembre 1892.

OFFENCES COMMITTED IN PARLIAMENT.

The recent occurrences in the British House of Commons when the members came to blows and engaged in a general affray, have suggested the question whether offences committed by members in Parliament are punishable in any other place, and the *London Law Times* has devoted considerable time and space to the subject. The results of its research are not without interest to students of parliamentary law and history. It is declared by the Bill of Rights "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any place out of Parliament." It is however submitted, in accordance with the well-known rule of construction, that the word "proceedings" must be governed in its meaning by the preceding words "freedom of speech and debates," and would not apply to an affray—the category under which the recent fracas, had it taken place in public outside the walls of Parliament, must be placed. The legal definition of an "affray" tallies with this scene in the House of Commons. An affray is an unpremeditated fighting between two or more persons in some public place to the terror of Her Majesty's subjects. Harris Crim. Law, 105. The declaration in the Bill of Rights is clearly inserted in repudiation of the conduct of King James II, complained of in that measure, namely, his "prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament." The fact, too, that breaches of the peace have from time immemorial been regarded as disentitling members of Parliament to freedom from arrest, would in itself go far to strengthen the surmise that offences against the person, even when committed by members within the walls of Parliament, would not be regarded as "cognizable only in Parliament." By a resolution of the Commons, of the 20th of May, 1675, it was declared "that by the laws and usages of Parliament privilege of Parliament belongs to every member of the House of Commons in all cases except treason, felony and breach of the peace." It was again stated by the Commons, at a conference on the 17th of August, 1641, "that no privilege is allowable in case of breaches of the peace betwixt private men, much more in the case of the peace of the kingdom;" and on the 14th of April, 1697, it was resolved that "no member of this House has any privilege in case of breach of the peace." May Parl. Prac. 145-146. These resolutions however refer solely to the question of

the liability of members to arrest for breaches of the peace committed outside Parliament, and cannot, of course, be carried further than suggesting strong surmises of the probable action of either House with reference to breaches of the peace committed by members within the walls of Parliament. The case of *Holles v. Valentine* in 1629 is the nearest precedent, from a constitutional point of view, to the late affray in the House of Commons. After the dissolution of the Parliament convened by Charles I, in 1628, the attorney-general exhibited an information against Sir John Eliot for words uttered in the House, namely, that the council and judges had conspired to trample under foot the liberties of the subject; and against Mr. Denzil Holles and Mr. Valentine for a tumult on the last day of the session, when the speaker, having attempted to adjourn the House by the king's command, had been forcibly held down in the chair by some of the members while a remonstrance was voted. They pleaded to the court's jurisdiction, because their offences were supposed to be committed in Parliament, and consequently not punishable in any other place. The court were unanimous in holding that they had jurisdiction, though the alleged offences were committed in Parliament, and that the defendants were bound to answer. The privileges of Parliament, said one of the judges, did not extend to breaches of the peace, which was the present case; and all offences against the crown, said another, were punishable in the Court of King's Bench. On the parties refusing to put in any other plea, judgment was given that they should be imprisoned during the king's pleasure, and not released without giving surety for good behavior, and making submission; that Eliot, as the greatest offender and ringleader, should be fined £2,000, and Holles and Valentine a smaller amount. 3 Rushworth State Trials; 2 Hallam Const. Hist. 4, 6. The great question of freedom of speech in Parliament, on the determination of which, according to Mr. Hallam, the power of the House of Commons, and consequently the character of the English Constitution, seemed to depend, was decided by this judgment in a sense clearly adverse to popular rights. In 1667 however the subject was again revived. It was then resolved by the House of Commons that an act of 4 Hen. VIII, which the judges had held at the trial of Eliot, Holles, and Valentine to be merely of a particular application, was a general law "extending to indemnify all and every the members of both Houses of Parliament in

all Parliaments for and touching any bills, speaking, reasoning or declaring of any matter or matters in and concerning the Parliament to be commenced and treated of." They resolved also that the judgment given in the 5th year of Charles I against Sir John Eliot, Denzil Holles, and Benjamin Valentine was an illegal judgment against the freedom and privilege of Parliament. To these resolutions the lords solemnly gave their concurrence, and Holles then became a peer; having brought the record of the King's Bench by writ of error before them, they solemnly reversed it. This decision has established beyond all controversy the great privilege of unlimited freedom of speech in Parliament; unlimited, that is to say, "by any authority except that by which the House itself ought always to restrain indecent and disorderly language in its members." 2 Hallam Const. Hist. 6. But does the reversal of this judgment decide that offences committed in Parliament by members, as indeed was argued in the case of Holles and Valentine, are not punishable in any other place, and that, accordingly, the participators in the recent affray are not answerable in a court of justice for their conduct? Mr. Hallam gives the following reply to this query. "It does not however appear," he says, "to be a necessary consequence from the reversal of this judgment (in the case of Eliot, Holles and Valentine) that no actions committed in the House by any of its members are punishable in a court of law. The argument on behalf of Holles and Valentine goes indeed to this length; but it was admitted in the debate on the subject, in 1667, that their plea to the jurisdiction of the King's Bench could not have been supported as to the imputed riot in detaining the speaker in the chair, though the judgment was erroneous in extending to words spoken in Parliament. And it is obvious that the House could inflict no adequate punishment in the possible case of treason or felony committed within its walls, nor if its power of imprisonment be limited to the session, in that of many smaller offences." 2 Const. Hist. 6, 7.—*Albany Law Journal*.

THE BEHRING SEA AWARD.

The daily papers have announced the contents of the award of the Behring Sea arbitrators, and we have witnessed the unwonted sight of both parties applauding the decision. The English papers express their satisfaction, having read the first part of the award; the United States press is truly thankful, having read

the rest. Lucky arbitrators! Rare judges be ye who satisfy both sides!

Unfortunately we must to some extent play the part of the wet blanket amid the joyful scene. The truth is that we are to a considerable extent losers in the action. We are winners where we were certain to win, and we are partly losers on the essential question.

Our readers will find fully discussed in our former issues the matters with which the arbitrators had to deal. To enable them to understand the decision we must recapitulate the points.

Art. 6 of the treaty required a separate answer on the five following questions:

'1. What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

'2. How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain?

'3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia? and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said treaty?

'4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary, in the treaty between the United States and Russia of March 30, 1867, pass unimpaired to the United States under that treaty?

'5. Has the United States any right, and, if so, what right, of protection in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?'

In the alternative, Art. 7 provided: 'If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend, and to aid them in that determination, the report of a joint commis-

sion, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit.'

The answer to the first five points was practically a foregone conclusion. The court has decided upon all of them in favour of Great Britain. The answers to the first, second, and third were even concurred in by Judge Harlan, one of the two American arbitrators, and on the point that the Behring Sea is a part of the Pacific Ocean they were unanimous, the American denial of this being too much even for the patriotic Senator Morgan. On the fifth point the two American arbitrators stood aloof, the British, French, Italian and Norwegian arbitrators being otherwise unanimous. The decision on this question is a theoretically important one. It is that 'the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit.' This is an authoritative statement in favour of the three-mile limit which has lately been exercising the minds of foreign international jurists.

So far this is satisfactory enough, but the Americans presumably do not care what the grounds are so long as what they get is what they want.

The British Commissioners proposed that a close season should be provided, extending from September 15 to May 1, during which all killing of seals should be prohibited, and that no sealing vessels should enter Behring Sea before July 1. They stated that, as a fact, Behring Sea is now usually entered by the pelagic sealers between June 20 and July 1, that the seals begin to travel towards Behring Sea about June 1. Now, it is only when the seals are on their way to Behring Sea that the Canadians have a chance of catching them. Great Britain has acquiesced all through in the principle of a measure for the preservation of seal life, but she contended that the measure should not be one-sided, and that they should include the regulations of the slaughter on the breeding islands, which are under the exclusive jurisdiction of the United States.

The United States on their side contended that the entire suppression of pelagic sealing was the only measure by which the utter destruction of seal life in the North Pacific could be prevented.

Let us now see how the tribunal has dealt with the question.

It has laid down the law to govern the future of North-west American sealing in the following seven articles:

'Art. 1. The Governments of the United States and Great Britain shall forbid their citizens and subjects respectively to kill, capture, or pursue at any time and in any manner whatever, the animals commonly called fur-seals, within a zone of sixty miles around the Pribiloff Islands, inclusive of the territorial waters.'

The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

'Art. 2. The two Governments shall forbid their citizens and subjects respectively to kill, capture, or pursue, in any manner whatever, during the season extending, each year, from May 1 to July 31, both inclusive, the fur-seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of North latitude, and eastward of the 180th degree of longitude from Greenwich, till it strikes the water boundary described in Art. 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.

'Art. 3. During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing-boats.

'Art. 4. Each sailing vessel authorised to fish for fur-seals must be provided with a special license issued for that purpose by its Government, and shall be required to carry a distinguishing flag to be prescribed by its Government.

'Art. 5. The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log-book the date and place of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

'Art. 6. The use of nets, firearms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shot-guns when such fishing takes place outside of Behring Sea, during the season when it may be lawfully carried on.

'Art. 7. The two Governments shall take measures to control the fitness of the men authorised to engage in fur-seal fishing;

these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

Art. 8. The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats, not transported by, or used in connection with, other vessels, and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each, in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur-seals outside of territorial waters under contract for the delivery of the skins to any person. This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian passes. Nothing herein contained is intended to interfere with the employment of Indians, as hunters or otherwise, in connection with fur-sealing vessels as heretofore.

Art. 9. The concurrent regulations, hereby determined with a view to the protection and preservation of the fur-seals, shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

Thus the United States are given a zone of sixty miles' jurisdiction round the Pribiloff Islands, of which the lessees of the islands will have the exclusive benefit. To this we have no objection. It is only right that they should be protected from raiding on the islands or in their immediate neighborhood.

As regards the close time, the arbitrators appear to have divided the season when the seals are to be found on the high seas. They have left August, one of the best months, open to the pelagic sealers, but they have far from adopted the British proposals.

Steam-vessels are excluded from sealing operations, and inside Behring Sea even ordinary guns are forbidden.

It is significant that these regulations were only carried by

four arbitrators against three. The Americans and Sir J. Thompson dissented. If Lord Hannen had dissented too, there would have been no decision, as Sir Charles Russell had consented to the whole question forming one decision, though this is contrary, as the writer believes, to the sense of Art. 7 of the Treaty of Submission.

There is a difficulty of execution still to be dealt with. The arbitrators' decision applies only to Great Britain and the United States. The co-operation in the proposed measures of other States is indispensable, and this under the treaty both parties are to use their best efforts to secure.

The work of the Court of Arbitration is concluded by the following recommendations, to supplement the regulations they have decided upon, by concurrent regulations applicable to within the limits of the sovereignty of the two powers interested. They also recommend that, 'in view of the critical condition to which it appears certain that the race of fur-seal is now reduced in consequence of circumstances not fully known,' both Governments come to an understanding in order to 'prohibit any killing of fur-seals either on land or at sea for a period of two or three years, or, at least, one year, subject to such exceptions as the then two Governments might think proper to admit of.'

Certain facts as to the claim for damages are found, but, as the agents of the two Governments submitted them jointly, this part of the decision is of no interest.

Thus ends a *cause célèbre* in international law, the full importance of which, as showing the efficacy of arbitration, cannot yet be judged. The weakness of the arrangement was in the case submitted being partly a legal and partly a technical one. For the legal part of the question no better court ever sat; for the technical part of the case the court was reduced to the good old device of splitting the difference, the course pursued by all those who, while wishing to be just, doubt their own powers too much to be emphatic.—*Law Journal (London.)*

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SUPREME COURT OF CANADA.

OTTAWA, May 1, 1893.

MACDONALD V. FERDAIS.

Quebec.]

Action confessoire—Real servitude—Apparent—Registration—44 and 45 Vic., ch. 16, secs. 5 and 6, (P.Q.)—Art. 1508, C.C.—Procedure—Matters of, in appeal.

By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369, in the Parish of Ste. Marguerite de Blairfindie, district of Iberville, reserved for himself as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent, as assignee of the owner of lot 370, continued to enjoy the use of said carriage road, which was sufficiently indicated by an open road, until 1887 when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from one McD. without any mention of any servitude, and the original title deed created by the servitude was not registered within the delay prescribed by 44 and 45 Vic. (P.Q.) ch. 16, secs. 5 and 6.

In an action brought by F. against C., the latter filed a dilatory exception to enable him to call McD. in warranty, and McD. having intervened, pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada :

Held, affirming the judgment of the court below, that the deed created a real apparent servitude, which need not be registered, there being sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370.

Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure.

Appeal dismissed with costs.

Paradis and Belcourt, for the appellants. .

Geoffrion, Q.C., for the respondent.

May 1, 1893.

BURY V. MURPHY. .

Quebec.]

Partnership monies—Sequestration of—Contre lettre.

In November, 1886, G. B., by means of a *contre lettre*, became interested in certain real estate transactions in the city of Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S. M. to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed and, pending the action, a sequestrator was appointed. In September, 1887, another action was instituted by G. B. against P. S. M., asking for an account of the different real estate transactions they had conformably to the terms of the *contre lettre*. The Superior Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second action. The Court of Queen's Bench affirmed the judgment of the Superior Court, dismissing the first action, and P. S. M. acquiesced in the judgment of the Superior Court on the second action. On appeal to the Supreme Court of Canada it was

Held, reversing the judgment of the court below, that the plea of compensation was unfounded, the appellant having the right to put an end to the respondent's mandate by a direct action, and therefore until the second action of account was finally disposed

of, the monies should remain in the hands of the sequestrator appointed with the consent of the parties.

Appeal allowed with costs.

Barnard, Q.C., for the appellant.

Monk, Q.C., for respondent.

May 1, 1893.

FOGARTY V. FOGARTY.

Quebec.]

Will—Construction of—Division of estate—Right to postpone.

T. F. F., who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision:

But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself, in co-partnership under the name and firm of Fogarty and Brother. Should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm for a period of five years, computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor.

T. F. F. died on the 29th April, 1889.

On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. F. and M. W. F. having agreed upon such statement, the balance shown was equally divided between the parties, viz.: \$24,146.34 being carried to the credit of M. W. F. in trust, and \$24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memorandum dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them.

On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to \$24,164.34 with interest from the date of the division and distribution, viz.: 30th April,

1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

Appeal dismissed with costs.

June 24, 1893.

MILLER V. PLUMMER.

Ontario.]

Promissory note—Accommodation—Bad faith of holder—Conspiracy.

P. endorsed a note for the accommodation of the maker who did not pay it at maturity, but having been sued with P. he procured the latter's endorsement to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M., a solicitor between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note, and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnishee it. This was carried out; the broker received the proceeds of the discounted note, and while pretending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the endorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself.

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was endorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note, and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker, and M. could only take it subject to the conditions under which the broker held it; that the broker not being the holder of the note there was no debt due from him to the maker, and the garnishee order had no

effect as against P.; and that the note was held by M. in bad faith, and P. was entitled to recover it back.

Appeal dismissed with costs.

Donovan, for the appellant.

Beck, for the respondent.

June 24, 1893.

WISNER V. COULTHARD.

Ontario.]

Patent—Combination—Old elements—New and useful result—Previous use.

In an application for a patent the invention claimed was "in a seeding machine in which independent drag-bars are used, a curved spring tooth detachably connected to the drag-bar in combination with a locking device arranged to lock the head block to which the spring tooth is attached substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old, but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination, and patentable as such.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the alleged invention being the mere insertion of one known article in the place of another known article was not a patentable matter. *Smith v. Goldie*, (9 Can. S.C.R. 46) and *Hunter v. Carrick* (11 Can. S.C.R. 300) referred to.

Appeal dismissed with costs.

Ridout, for the appellants.

Arnoldi, Q.C., and *Roaf*, for the respondents.

May 1, 1893.

HOWLAND V. DOMINION BANK.

Ontario.]

Practice—Renewal of writ—Setting aside order for—Statute of limitations.

A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a master in chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the master to have the service and last renewal set aside, which application was granted, and the order setting aside said service and renewal

was affirmed on appeal by a judge in Chambers and the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal which also affirmed the order of the Master. Mr. Justice Osler, who delivered the principal judgment, held that the master had jurisdiction to review his own order; that he held that plaintiffs had not shown good reasons under rule 238 (a) for extending the time for service, and this holding had been approved by a judge in Chambers and a divisional court; and that the Court of Appeal could not say that all the tribunals below were wrong in so holding. On appeal to the Supreme Court of Canada:

Held, that for the reasons given by Mr. Justice Osler in the Court of Appeal, the appeal to this court must fail and be dismissed with costs.

Appeal dismissed with costs.

Arnoldi, Q.C., for the appellants.

Dr. McMichael, Q.C., for the respondents.

May 1, 1893.

MOORE V. JACKSON.

Ontario.]

Married woman's property—Separate estate—Contract by married woman—Separate property exigible—C. S. U. C. c. 73—35 V. c. 16 (O.)—R.S.O. (1877) cc. 125 and 127—47 V. c. 19 (O.)

By the Married Woman's Property Act, 1887, of Ontario, (47 V., c. 19) a married woman is capable of acquiring, holding and disposing of real or personal property as if she were a *feme sole*; of entering into and rendering herself liable on any contract, and of suing or being sued alone in respect of such property; the right of the husband as tenant by the curtesy is not to be prejudiced by such enactment.

Held, reversing the decision of the Court of Appeal, that the property held by a married woman under this act is "separate property," and may be taken in execution for her debts, notwithstanding the reservation in favour of her husband.

Appeal allowed with costs.

Moss, Q.C., for the appellant.

Armour, Q.C., for the respondent.

May 1, 1893.

DUMOULIN v. BURFOOT.

Ontario]

Contract—Sale of land—Building restriction—Description—Street boundaries—Construction of covenant.

The owners of a block of land in Toronto, bounded on the north by Wellesley street, and west by Sumach street, entered into an agreement with B. whereby the latter agreed to purchase a part of said block which was vacant wild land, not divided into lots, and containing neither buildings nor street, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia street. The agreement contained certain restrictions as to buildings to be erected on the property purchased, which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley street produced.

A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant: "And the grantors covenant with the grantees that in case they make sale of any lots fronting on Wellesley street or Sumach street, on that part of lot 1 in the City of Toronto, situate on the south side of Wellesley street and east of Sumach street, now owned by them, that they will convey the same subject to the same building arrangements or conditions (as in the agreement).

The vendors afterwards sold a portion of the remaining land fronting on Amelia street, and one hundred feet east of Sumach street, and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the covenant included all the property south of Wellesley street; that the land not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach streets, and so within the purview of the deed; and that the vendors could not, by dividing the property as they saw fit, narrow the operation and benefit of their own deed.

Held, per Gwynne, J. The piece of land in question did not front or abut on either Wellesley or Sumach street, but on Amelia

street alone, and was not, therefore, literally within the covenant of the vendors.

Appeal dismissed with costs.

Arnoldi, Q.C., and *Bristol*, for the appellants.

Nesbitt and Galt for the respondent.

June 24, 1893.

THE MIDLAND RY. CO. V. YOUNG.

Ontario.]

Title to land—Tenant for life—Conveyance to railway company by—Railway acts—C.S.C., c. 66, s. 11, ss. 1—24 V., c. 17, s. 1.

By C.S.C., c. 66, s. 11 (Railway Act) all corporations and persons whatever, tenants in tail or for life, *grevés de substitution*, guardians, etc., not only for and on behalf of themselves, their heir and successors, but also for and on behalf of those whom they represent . . . seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, etc., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is not authorized by this act to convey to a railway company the interest of the remainderman in the land.

Appeal dismissed with costs.

Osler, Q.C., for the appellants.

Kerr, Q.C., for the respondents.

June 24, 1893.

CUMMING V. LANDED BANKING AND LOAN COMPANY.

Ontario.]

Trustee—Will—Executors and trustees under—Breach of trust by one—Notice—Inquiry.

W. and C. were executors and trustees of an estate under a will. W., without the concurrence of G., lent money of the estate on mortgage and afterwards assigned the mortgages, which were executed in favour of himself described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same.

Held, reversing the judgment of the Court of Appeal, that in taking and assigning said mortgages W. acted as a trustee and as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees inasmuch as the breach of trust consisted in the dealing with the securities themselves, and not in the use made of the proceeds.

Appeal allowed with costs.

Marsh, Q. C. for the appellants.

W. Cassels, Q. C., and *MacKelcan*, Q. C., for the respondents.

June 24, 1893.

DWYER V. PORT ARTHUR.

Ontario.]

Municipal corporation—By-law—Street Railway—Construction beyond limits of municipality—Validating act—Construction of.

The Corporation of the town of Port Arthur passed a by-law entitled, "a by-law to raise the sum of \$75,000 for street railway purposes, and to authorize the issue of debentures therefor," which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the rate-payers and passed, but none was submitted ordering the construction of the work. Subsequently an act was passed by the legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town . . . And for all purposes, etc., relating to or affecting the said by-law, any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with.

Held, reversing the decision of the Court of Appeal, that the said act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act, requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law.

Held, also, that an erroneous recital in the preamble to the act that the town council has passed a construction by-law had no effect on the question to be decided.

Appeal allowed with costs.

Aylesworth, Q.C., for the appellant.

Delamere, Q.C., for the respondents.

June 24, 1893.

HALIFAX STREET RAILWAY CO. V. JOYCE.

Nova Scotia.]

Negligence—Street railway—Height of rails—Statutory obligation—Accident to horse.

The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove and he was injured. In an action by the owner against the company, it appeared that the rail, at the place where the accident occurred, was above the level of the roadway.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby.

Appeal dismissed with costs.

Ross, Q.C., for the appellants.

Newcombe, for the respondent.

June 24, 1893.

O'CONNOR V. NOVA SCOTIA TELEPHONE COMPANY.

Nova Scotia.]

Municipal corporation—Ownership of roads and streets—Rights of private property owners—Ownership ad medium filum viæ—R.S.N.S. 5th ser. c. 45—50 Vict. c. 23 (N.S.)

The act of the Nova Scotia legislature, 50 V. c. 23, vesting the title to highways and the lands over which the same pass in the crown for a public highway, does not apply to the City of Halifax.

The charter of the Nova Scotia Telephone Company authorized the construction and working of lines of telephone along the sides

of and across and under any public highway or street of the City of Halifax, provided that in working such lines the company should not cut down or mutilate any trees.

Held, Taschereau and Gwynne, JJ., dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees in front of his property in working the telephone line.

Appeal allowed with costs.

Newcombe, for the appellant.

Borden, Q.C., for the respondent.

SUPERIOR COURT ABSTRACT.

Joint stock company—Companies' Act 1862-83, (imperial)—Winding-up Act—Liquidator, status of, before Canadian courts—Intervention—Deposit—Saisie arrêt.

Held :—Where Canadian creditors of a joint stock company incorporated under the (Imperial) Companies' Act 1862-83, are proceeding to execute a judgment obtained in the courts of this province upon assets of the company situate within the province, a liquidator named in Great Britain to the voluntary winding-up of such company cannot intervene and demand that the company's assets be removed to Great Britain, to be there by him distributed in accordance with the provisions of the said Companies' Act.

Quære, has such liquidator any standing before the courts of this province?

In the present case, the garnishees ordered to deposit with the prothonotary a sum of \$51,000 placed in their hands to meet a possible judgment in another case against the same defendants.—*Quebec Bank v. Bryant et al., & Hall et al., T. S., Powis*, intervening, & *The Quebec Bank*, contesting, Quebec, Andrews, J., April 15, 1893.

Procédure—Exécution—Opposition—Fi. fa. rapporté après délai—Venditioni exponas—Saisie, quand caduque—C. P. C., 578-589 C. P. 172.

Jugé :—La prorogation du bref de *fieri facias* par le juge n'est requise que lorsque la saisie n'est pas suspendue par une opposition; lorsqu'elle est ainsi suspendue elle subsiste, même après le délai pour le rapport du bref, si l'obstacle que l'opposition fait à la vente n'est pas écarté auparavant.

Comme le code de procédure ne fixe pas un délai pour la péremption de la saisie, dans le cas où l'obstacle n'est écarté que subséquentement au jour fixé pour le rapport du bref, on doit recourir à la loi antérieure pour fixer sa durée, savoir, à l'article 172 de la Coutume de Paris, qui donne à la saisie une durée de deux mois après que l'obstacle à la vente a disparu.

Les mots *écarté subséquentement* de l'article 589, C. P. C., signifient "écarté subséquentement à la saisie, mais avant le retour du bref." *Lavoie v. Lacroix*, R. O. Q., 1 C. S. 57, renversée.

Une opposition basée sur le prétendu transport du jugement à un tiers, mais qui n'allègue ni signification ni acceptation de ce transport, sera rejetée sur défense en droit.

Une composition entre le demandeur et le défendeur, antérieure à la saisie, et non payée, ne justifie pas une opposition afin d'annuler par ce dernier.—*Martineau v. Fournier*, Québec, C. R., Casault, Caron, Andrews, JJ., 31 mai 1893.

Substitution—Vente forcée d'un bien substitué—Substitution créée par une donation onéreuse—Articles 929, 953, C. C.

Jugé:—Le substituant qui, par une donation créant une substitution, a imposé certaines charges au grevé, assurées par privilège de bailleur de fonds, que ce dernier n'a pas remplies, peut faire saisir et vendre l'immeuble substitué, et cette vente a l'effet de purger la substitution.

2. Une substitution ne peut être créée qu'autant qu'elle se rattache à une libéralité, la substitution ne pouvant exister que lorsque la personne qui en a été chargée a été gratifiée par l'acte créant la substitution. Ainsi, lorsque les charges stipulées égalent la valeur de l'immeuble qu'on a prétendue substituer, il n'y aura pas de substitution, l'acte en question constituant une véritable vente.—*Lalonde v. Daoust*, Montréal, Taschereau, J., 22 décembre 1892.

Chemin de fer—Co-propriétaires—Incendie causé par flammèches d'engin—Responsabilité.

Jugé:—Une compagnie de chemin de fer qui a la direction d'une voie, dont elle est propriétaire par indivis avec une autre compagnie, est responsable du dommage résultant d'incendies causés par les feux d'engins de l'une ou de l'autre compagnie,

sauf recours.—*Lemieux et al. v. Cie. du chemin de fer Québec & Lac St-Jean*, C. R., Québec, Casault, Routhier, Andrews, JJ., 31 mai 1893.

Procédure—Timbres additionnels, apposition de, à pièce insuffisamment timbrée—S. R. Q., 1171, 1172, 1176, 1177—*Action paulienne—Preuve.*

Jugé :—Une réponse à un interrogatoire sur faits et articles qui contient une assertion étrangère aux faits demandés, peut être divisée.

La preuve testimoniale de l'existence d'hypothèques sur un immeuble n'est pas légale.

L'action paulienne ne poursuivant pas la déclaration d'une nullité relative, mais d'une nullité absolue, le montant des timbres à apposer sur les procédures doit être réglé, non par la somme demandée, mais par la valeur des biens qu'on cherche à faire rentrer dans le patrimoine du débiteur.

Lorsqu'une pièce du dossier est insuffisamment timbrée, comme la loi ne fixe pas le délai où la demande pour permission d'y apposer des timbres additionnels doit être faite après la découverte de l'erreur, il suffit que celle-ci existe à la date de la procédure qui n'a pas été revêtue des timbres requis, pour que la partie en faute puisse obtenir permission de la réparer.

Il n'est pas nécessaire que le dossier soit transmis au tribunal de première instance pour avoir cette permission; elle peut être accordée, cour séante, par la cour de révision, lorsque le défaut n'est signalé que devant ce tribunal.—*Leclaire v. Côté et al.*, C. R., Québec, Casault, Routhier, Caron, JJ., 31 mai 1893.

Compagnie minière responsable en dommages envers employé blessé par explosion de poudrière non-munie de paratonnerres—S. R. Q. 876, 1011.

Le demandeur, employé de la défenderesse, en s'en allant de son ouvrage, s'est réfugié pendant un orage dans une bâtisse appartenant à la défenderesse, et pendant qu'il y était la foudre est tombée sur une poudrière voisine, aussi appartenant à la défenderesse, qui n'était ni construite suivant les proscriptions de la loi ni protégée par des paratonnerres, laquelle a fait explosion et a détruit en partie la bâtisse où s'était réfugié le demandeur, infligeant à celui-ci des blessures graves.

Jugé :—Que l'inobservation des prescriptions de la loi dans la construction de la dite poudrière était une faute et une négligence qui ont rendu la défenderesse responsable du dommage que l'explosion d'icelle a causé au demandeur.

Les lois concernant les poudrières, S. R. Q., 876, §6, 1011, et les règlements faits par le lieutenant-gouverneur en conseil conformément à icelles, s'appliquent aux compagnies minières—*Garon v. Anglo-Canadian Asbestos Co.*, C. R., Québec, Casault, Routhier, Andrews, JJ., 31 mai 1893.

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Damages—Libel in pleading—Justification.

A party who, in a pleading, accuses another of fraud and collusion, will be held liable in damages, if the circumstances be not such as would produce on the mind of a cautious and prudent man an honest conviction of the guilt of the party he accuses.

In the present case, the defendant having been cognizant of the loan made to his debtor by the plaintiff, and having himself received the greater part of it, a charge by him that plaintiff, in taking security for the loan, by way of sale *à réméré* of all the debtor's property, had acted collusively with such debtor to defraud him, the defendant, held libellous and actionable.—*Casault, J., diss.*) *Matte v. Ratté*, C. R., Québec, Casault, Caron, Andrews, JJ., 31 May, 1893.

Procédure—Amende—Non-enregistrement de déclaration par femme séparée de biens faisant commerce—C. P. C. 981—Affidavit—S. R. Q. 5716—Assignment—Exception à la forme—Contrainte par corps—Forclusion—Enquête—Serment du sténographe.

Jugé :—1. On ne peut pas objecter à une partie qu'elle poursuit sous ses vrais prénoms, quoiqu'elle l'eût pu sous ceux sous lesquels elle a toujours été connue.

2. Lorsque le mari n'est mis en cause que pour assister sa femme, la signification d'une seule copie, à la femme, des bref et déclaration, est suffisante.

3. Le demandeur dans son action *qui tam*, qui, dans son affidavit (S. R. Q. 5716), néglige de jurer qu'il n'agit point "en vue de retarder ou de faire échouer l'action d'une autre personne," omet une formalité essentielle à son droit de poursuite, et bien que cette omission ne puisse être attaquée par exception à la forme elle peut l'être sans plaider aucun, et elle est fatale à la demande.

4. Lorsque le demandeur, sans produire une pièce sur laquelle l'action est fondée, a forclos le défendeur de plaider et a procédé *ex parte* jusqu'à l'audition au mérite et la mise de la cause en délibéré, il ne peut plus produire cette pièce sans renoncer à la forclusion et à toutes les procédures subséquentes et sans donner avis au défendeur de la production de la pièce en question.

5. L'enquête prise à un jour subséquent à celui fixé, sans ajournement de la cause à tel jour, et sans nouvel avis à l'autre partie, est illégale.

6. Les sténographes officiels, étant des officiers de la cour, doivent prêter un serment d'office, et n'ont pas besoin d'être assermenté dans chaque cause.

7. Dans une poursuite pour amende contre une femme séparée de biens qui fait le commerce sans avoir déposé la déclaration voulue (C. P. C. 981), une condamnation par corps n'est pas autorisée par la loi, et rend le jugement nul.

8. Dans une action *qui tam* le demandeur, tant que le jugement n'est pas prononcé, est *dominus litis* et peut, si la couronne n'intervient pas, renoncer à des procédures de l'instance, mais après que le jugement a été prononcé il ne le peut plus, car ce jugement donne des droits à un tiers, "la couronne," et il ne peut pas y renoncer ni pour le tout ni même pour une partie.

9. Lorsqu'une cause est inscrite à l'enquête et mérite il doit, en l'absence d'un consentement des parties, être procédé à l'enquête cour séante, et le jurat au bas des dépositions doit le constater.—*Guay qui tam v. Durand et vir*, C. R., Québec, Casault, Routhier, Caron, JJ., 31 mai 1893.

Procedure—Initial of name—Summary matters.

Held:—1. Where the writ of summons sets forth one of plaintiff's baptismal names and indicates the other by its initial letter, the action will not be dismissed on exception to the form.

2. Where an action is brought by a trader on an account, although the articles the price whereof is sought to be recovered are not such as would form part of the merchandise dealt in by the plaintiff, yet if it be proved that the articles were received and sold by him to the defendant in the ordinary course of his commercial operations, the case is governed by the provisions of art. 887 *et seq.*, C.C.P., regulating summary matters.

3. It is not required by law that the days of delay between

service of writ and return should be juridical days.—*Martin v. Martin*, Montreal, Doherty, J., May 25, 1892.

Société—Convention interdisant aux associés d'intéresser un tiers à leur part dans la société—Retrait social.

' Le 17 décembre 1888, le demandeur et MM. J. L. Cassidy (depuis décédé), et Dumont Laviolette se mirent en société pour acquérir la part de feu Claude Melançon dans la société John L. Cassidy & Co., et convinrent de former une nouvelle société, à l'expiration de celle qui existait déjà, et qui se composait de MM. Cassidy, Laviolette, Aumond, Gariépy et des représentants de feu M. Melançon. La société alors existante avait été formée pour cinq ans, à compter du 5 janvier 1886. Aux termes du pacte social, il était interdit à aucun associé d'intéresser un étranger à sa part dans la société, et il fut de plus convenu que la mort d'un associé ne mettrait pas fin à la société, mais que les représentants de cet associé resteraient associés commanditaires. Le 26 décembre, le demandeur et MM. Cassidy & Laviolette se firent donner, de la part des héritiers Melançon, une promesse de vente des droits de ceux-ci dans la société John L. Cassidy & Co. Le 5 janvier 1891, le demandeur fit signifier cette promesse de vente aux membres de la dite société, demandant le partage d'icelle, mais ceux-ci formèrent une nouvelle société à l'exclusion du demandeur.

Jugé: 1. Que les conventions du 17 et du 26 décembre étaient légales, malgré la clause du contrat de société qui défendait aux associés d'intéresser un tiers à leur part, et que, nonobstant cette clause, il était loisible à quiconque, tiers ou associé, d'acquérir les droits que possèderaient l'un des associés à l'expiration de la société.

2. Que le retrait social, soit le droit, pour les associés, d'acquérir, à l'exclusion des tiers, la part de leurs co-associés lors de la dissolution de la société, n'existe pas dans notre droit en l'absence d'une convention expresse accordant ce droit de préférence aux associés.—*De Martigny v. Laviolette et al., & Gratton et al.*, mis-en-cause, Montréal, de Lorimier, J., 31 octobre 1892.

Cour des commissaires—Commissaire illettré—Certiorari.

Jugé:—Un jugement rendu à la cour des commissaires par un commissaire qui ne sait ni lire ni écrire est nul et illégal, et sera cassé sur *certiorari*.—*Meloche & Brunette*, Montréal, Loranger, J., 25 janvier 1892.

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CURRENT TOPICS AND CASES.

The principal question decided by our Court of Appeal in *Wood & Atlantic & N. W. Ry. Co.* (Montreal, April 26, 1893) is one of great importance, and it is well perhaps that the case should be taken to a higher court, as we believe is about to be done. The Court of Appeal holds that where land is expropriated for railway purposes, the company is bound to compensate the proprietor not only for the land actually taken, but also for the direct damage to the rest of his land and property, resulting from the construction of the railway or from the future operation of the road. In the case in question, a church was rendered all but useless by the construction and proximity of the railway. The company merely desired to expropriate an overhead passage over a lane. This however, was held sufficient to bring them under the Railway Act, Mr. Justice Hall remarking, "The court is agreed in thinking that the expropriation of an overhead passage gives the right to the enforcement of all the statutory rights which would follow from expropriation of subterranean or surface rights." The actual damage by construction and the value of the land taken were in this case comparatively insignificant, the court below awarding merely \$1,367, instead of \$16,808, the damages assessed by the arbitrator's award. The great question was whether damage from the future operation of the road could be considered. The general principle is that no one can use his own property

to the detriment of his neighbour, even if the exercise of such right be under the authority of an act of Parliament. Applying that principle, the Court of Appeal came to the conclusion that the arbitrators were justified in taking into consideration the injurious effect upon the present occupation of the property, resulting from the noise and vibration caused by the train service in such close proximity to the church. The original award has therefore been maintained. It is difficult to see how the proprietor would receive the full compensation to which he is entitled unless the whole damage were included in the award. If, however, this overhead passage had not been required by the company the damage to the church would have been nearly the same. Would the court be equally ready to maintain an action for damages resulting from operation of the road, brought by a person in the immediate vicinity, but whose property has not been actually touched by the railway line?

Another decision of importance is that delivered by the Court of Appeal at Montreal, Sept. 27, 1898, in *Forget & Ostigny*. The question was whether a broker could recover a balance due by a customer, on transactions in stocks upon margin, and without any intention to make a real purchase of the stocks. The question was very fully examined both by the Chief Justice and by Mr. Justice Hall who delivered an elaborate dissentient opinion. The result is that by four to one the right of action of the broker is denied. In *McDougall & Demers*, M. L. R., 2 Q. B. 170, the Court of Appeal stood three to two, Justices Monk and Ramsay being the dissentient judges. The circumstances of the two cases are not quite similar, but the view taken by the majority in each case is nearly the same. The present case, it is expected, will be carried to the Privy Council, and the Chief Justice, it may be observed, expressed the hope that it would be taken to the highest

court, in order that a question of such moment might be finally settled.

The bar of Montreal have apparently not shown much interest in the bill submitted to the legislature last session by the Attorney General for the reorganization of the courts. On one occasion when a meeting was convened for its consideration, there was no quorum, and on another occasion the attendance was so small that the meeting was adjourned. It may be remarked, however, that in the latter part of September, immediately following the long vacation, it is not an easy matter for lawyers to get time for meetings. Cases have to be looked up and got ready for the Courts of first instance, for review, for appeal, and for the Supreme Court. It is probable, also, that the feeling that the bill was likely to fail in the legislature owing to the opposition of country members, had some effect in diminishing the interest in the measure. It must not be assumed, however, that the bill will not receive fair and candid consideration from all the lawyers in the legislature, whether they represent country or city constituencies, and at all events it is worthy of the most careful attention from a bar so large and important as that of Montreal.

Some of the country judges seem to have been unnecessarily sensitive to a supposed imputation upon their ability and usefulness. The whole thing seems to have arisen from a pure misunderstanding. It is evident that neither the bar nor any section of it, formulated any complaint, or had any disposition to do so. Country judges and judges appointed from the country sections have borne too important a part in the work of the courts for many years past, to leave any room for cavil. We may take this opportunity to say that there is too much shallow and ignorant criticism of our superior judges. Very few have so strong a light thrown upon their daily acts as

they. If they are weak, if they seriously fall short of their duty in any particular, it will soon be known. But they should be protected against groundless imputations. A daily journal remarks that there was a time when the conviction was universal with regard to Canadian judges that whatever their previous record they could be entirely trusted as judges, and asks "is this conviction as strong to-day?" If it is not so, it is due chiefly to the habit of evil-speaking which is certainly strong enough in the present generation.

The vacancy on the bench of the Supreme Court of Canada, has been filled by the appointment of Mr. Justice King, of the Supreme Court of New Brunswick.

Mr. King was born in St. John in 1839, and is a son of the late George King, shipbuilder, and a graduate of the Wesleyan University, Connecticut. He studied law and was admitted an attorney in 1863, called to the Bar in 1865, and appointed Queen's Counsel in 1872. He was a partner of the law firm of Morrison & King from 1865 until the death of Mr. Morrison in 1875. In politics Mr. King was a strong supporter of the old Liberal party, and an earnest advocate of Confederation. He was first elected to the New Brunswick Assembly in 1867 along with the late Joseph Coram, on the retirement of Messrs. Gray and Wilmot just after Confederation. He was returned at the general election in 1870 and again in 1874. In January, 1869, he entered the Government of Attorney-General Wetmore without office, and on Mr. Wetmore's election to the bench of the Supreme Court succeeded him as attorney-general, holding that office down to 1878, when he resigned it and left the Local Legislature. In that year he was an unsuccessful candidate for the Commons for the city and county of St. John. On December 10, 1880, Mr. King was appointed a judge of the Supreme Court of New Brunswick.

SALE OF SHARES—DIVIDENDS.

Whether the sale of stock shares carries with it declared dividends is the question that arose in the Supreme Court of this State in the case of *Warner v. Watson*. The *National Corporation*

Reporter says the rule obtains that by the declaration of a dividend, it becomes separated from the stock, and after the declaration of a dividend, a transfer of the stock does not transfer the dividend. The general rule is qualified by the custom of the Stock Exchange, where dividends declared pass with the stock, before the books of the company close, but Stock Exchange rules only govern its members and not the general public. This question underwent full discussion and determination in the case of *Hopper v. Russell Sage*, 112 N. Y. 530, where it was held that a dividend declared upon corporate stock, belongs to the owner of the stock at the time, although the dividends are made payable at a future time; hence, in the absence of any provision to the contrary, in a contract of sale and purchase of stock made outside of and not subject to the rules of the Stock Exchange, dividends previously declared but made payable thereafter, belong to the seller and are not transferred by contract. The declaration of a dividend is in legal contemplation a separation of the amount from the assets of the corporation, which holds such amount thereafter as the trustee of the stockholder at the time of the declaration of the dividend. In the principal case under consideration plaintiff's assignor had pledged stock for a loan with persons who, before the loan was due, fraudulently and without notice to the assignor sold the stock 'dividend on' on the floor of the Stock Exchange. At the time of the sale dividends had been declared but were not then payable. It was held that though the custom of the Stock Exchange provided that dividends declared passed with the stock until the books of the company closed, such custom did not affect the plaintiff's assignor, he not being a member of the Exchange, and the dividend did not pass with the sale of stock. The dividend for which the action was brought, had been declared by the Delaware and Hudson Canal Co., out of the profits of the year 1891, payable quarterly during the year 1892, to stockholders of record at various prescribed times during that year.—*Albany Law Journal*.

CROSS-EXAMINATION AS AN ART.

Every lawyer of only five years' practice has discovered what an art cross-examination has become,—to rank with sculpture and painting. May not the tools of the expert cross-examiner be figuratively described as the mallet of manner giving the adroit

stroke; the chisels of rhetoric or of tone of voice for delicate incisions? Must not the touches of the cross-examiner be not less delicate than those of a Praxiteles or a Powers? Does he not before exercising his art of cross-examination and during the direct examination carefully scan and study the witness produced in the aspect of a model? Has he not in such a study, rapid as it must necessarily be, borne in mind maxims of Lavater and Spurzheim, as the sculptor remembers many of Canova? For like the chiselling sculptor, the cross-examiner knows that he must carefully bear in mind the features and form of the model's testimony, and carve these to his own end, especially the features of his own theories applied to the evidence given.

During a dozen years of continuous service as district attorney of New York City, and of a score years in civil actions as counsel for seven sheriffs in whose litigations fraud of debtors was examinable, I possessed very fair opportunities of studying the art of cross-examination as practised by bar-leaders, who as against the people or as retained by claimants against the sheriff were generally employed. This gave opportunity for testing the saying: "*Fas est ab hoste doceri.*" Seven years of a subsequent residence in London, while frequently attending its courts, furnished further opportunity for studying cross-examination as an art and as practised by eminent solicitors before magistrates and by Q.C.'s in the Supreme Court of Judicature, and in that best court for testing the art, the Bankruptcy Court.

Of those in England whom I found to be what I may term professors of the art, I mention George Lewis, who confessedly heads his profession as solicitor; Attorney-Generals Webster and Sir Charles Russell; Solicitor-General Sir Edward Clark, and a battalion of Q. C.'s, who by promotion from the Lord Chancellor, cross-examine in what William Black the novelist in his popular romance entitles "*In Silk Attire,*" and who wear wigs such as covered—I can hardly use the word "*adorned*"—the brows of two King Henries of the bar, Erskine and Brougham.

While I was a student in the Harvard Law School under Greenleaf and Story, whose memories and learning have worthily graced brilliant successors, I often and in company with such classmates as Rutherford B. Hayes and Geo. Hoadley, both of whom became eminent in public life, listened to and studied, in connection with Greenleaf's fitting chapter in his "*Evidence,*"

the artful cross-examinations of Rufus Choate, whose art is well "kept green" by his nephew Joseph in New York.

While afterwards pursuing the study of civil law in New Orleans, I had occasion to hear cross-examinations of such advocates as John R. Grymes, Alfred Hennen, George Eustis, father of the Minister at Paris, and who was afterward Chief Justice of the State, Thomas Slidell, and Judah P. Benjamin, into whose brilliant eyes all suspicious witnesses found it difficult to look when he practised upon them his art that he masterfully knew, and which, when he became an English Q.C., stood him in great regard from bench and bar and at all the inns and Temples.

At the New York Bar I had opportunities of studying the cross examination arts of Charles O'Connor, Ogden Hoffman, John Van Buren, Edward Sandford, Daniel Lord, James T. Brady, David Dudley and Stephen J. Field, the brothers David and John Graham, Henry L. Clinton, Louis B. Woodruff, who afterward died as Federal Circuit Judge, Attorney-General Ambrose L. Jordan, and William Curtis Noyes, only three of whom survive. Their successors in the art at the New York City Bar were undoubtedly William Fullerton, Joseph H. Choate, Robert J. Ingersoll, Clarence A. Seward, and Messrs. Root, Rollins, Coudert, James, Fellows, Cochran, Nicoll, Holmes, and Parsons. Of those in my list who have passed away, my best representative of the art was, by all odds, David Graham, who can only be remembered by the later generation of the bar as author of a treatise on new trials. I select him as my model of a XX examiner.

When he rose to cross-examine a hostile witness, he was like a duellist during the time when seconds were measuring the ground. Calm, suave, not exhibiting acerbity in look or tone, ready however, like a good surgeon, to use lancet or probe with full knowledge of the strength of the witness in muscles of prevarication, or of the exact situation of the nerves of the witness, Mr. David Graham's furtive study of the witness during the direct, as well as of the judge and jurors, as determining what effect the adverse testimony was having upon them, presented a fine forensic picture. Nor did he, for a similar purpose, omit to scan auditors also. While the direct proceeded, he was an actor, who could conceal emotion, express surprise, doubt or dissent, with a facial gesture in a timely glance at the jury. Like the duellist of the foregoing illustration, he was ever courtesy itself.

never losing temper or presence of mind. He never committed the average error of counsel in arguing with the witness, or over the witness forestall summing up to the jury through some question. He reserved his appreciation of a telling or of a random shot of evidence, and his comment of facial expression or of rhetoric, to his address to the jury. He never proposed to allow a witness to understand fully the motive of a question. If the witness was subtle, he fought him with suavity, and soon threw him off guard. The too willing or rapid witness he encouraged into quicksands of contradiction or a slough of mis-statement. He never assumed risks with questions that might bring hostile answers. He never threw bait or fly, as t'were into a stream of inquiry, unless he knew the stone under which lay the pike, nor where he suspected that trout were absent.

One of his maxims to students was, "Never on cross-examination ask a question the answer to which in any one possible way might aid the other side and place your own side in jeopardy of dangerous comment." Like a keen marksman, he accommodated his aim of inquiry to the direction in which the wind was blowing. He did not waste time on immateriality for his client by cross-questions.

He had studied the very bull's eye of his case, and tried to bury at times his own bullet in the very opening made by his adversary's bullet. Like the French swordsman, he sought his adverse witness while off guard. His whole play was a standing rebuke to Old Bailey practitioners, who bullied witnesses. He could be severe with hostile witnesses, but preferred to strike them with the gloved rather than the mailed hand. Another Graham maxim was: "If your adverse witness becomes forewarned by your manner or address, he is likely to be aroused to greater antagonism of evidence." On one occasion a witness examined by David Graham, was heard to say, "if anyone testifying could be persuaded into perjury or contradiction or inconsistency, David Graham is the lawyer to accomplish it." He was throughout cross-examination a master in realizing the maxim "*ars celare artem*." His especial aim was in the main to convert the hostile witness into a witness for his own client. This was a purpose even beyond the ordinary purpose of destroying or weakening the direct.

Above all, he knew when and where to refrain from cross-questions, a great incident in the art. He reminded one of the

skater who never ventures on or near thin ice, although there were no visible signs of "dangerous." In this adroit refraining he probably remembered the anecdote accredited to Curran and his horse-stealing client. The latter said after acquittal: "No thanks to you John Philpot, and I ought to have the fee returned, for you never cross-examined a witness nor made a speech in my favor." "If I had even opened my mouth under the circumstances, the possibilities are, under the view judge and jury seemed evidently taking of your case, that you might then have been convicted." Plausible as David Graham was with the hostile witness, he was equally plausible in commenting to the jury upon the testimony of that witness. He was a thorough disciple of Henry Brougham's celebrated definition of an advocate's duty to his client, that was enunciated in his address to the Lords when defending Queen Caroline, the doctrine of which definition several strict ethical writers have impugned.

It may be observed that the brother, John Graham, still in active practice, seemed to rival the elder by his own methods of adroit and successful cross-examination.

At the New Orleans Bar, as far back as the year of the Mexican War, Judah P. Benjamin seemed to possess and excel in most of the traits in the art of cross-examination already imputed to David Graham. Benjamin especially possessed celerity of thought and ready aptitude in dealing with the demeanor and expressions of a hostile witness. Like single-speech Hamilton in the traditions of the House of Commons, Mr. Benjamin knew when to quit talking; and like a good stage manager, he always arranged a good exit from the witness chair for his actor, who may have there endured forgetfulness of his cues.

Without attempting to distinguish, or to extinguish, by mention any of the barristers or Q.C.'s of the London Bar excelling in the art in question, beyond a passing tribute to the careful and meritorious cross-examinations of Messrs. Charles Mathews, Poland and Gill, it may be observed that in this art not one of those cross-examiners can equal the excellence in it of those best known at the American Bar, from Maine to San Francisco; and for the reason that the former are nationally slower and less elastic than the latter. Is not the cross-examiner who "deliberates," like the woman commemorated by the Pope of poets, 'lost'? The average American cross-examiner is in

the battle of testimony like the Zouave, and the Englishman like a heavy dragoon by comparison, the one alert in action and quick with rifle, while the other takes time for drawing his sabre. Moreover, the former thinks for himself, while the other is compelled to think more or less through a solicitor, and is fettered more or less by iron-clad instructions.

It takes the lawyer who joins the bar as a fledgeling a long time often to acquire the art. He finds that he has to cultivate, for success in it, celerity of thought, close observation of human nature, and a study of its various phases, rapid exercise of judgment on the occasion sudden, command of feature and temper, and above all he must know when to stop cross-examination. Playwrights and actors learn how to value the good exit; and the lawyer who is adept in the art of cross-examination arranges an exit for his hostile witness that shall tell in favor of his own client. The young advocate's most frequent short-coming in cross-examination is avidity at it, and eagerness to press questions. His self-sufficiency and indeed conceit will too often tempt to precarious questioning or too much detail in queries. Then how often at *Nisi Prius* one witnesses a rash although keen "encounter of wits" between cross-examiner and witness, wherein the latter gets the advantage as Beatrice did over Benedict? For cross-examination that makes much ado about nothing degrades the art of it. The lawyer, young or old, must never risk the fate of a client by attempts at merely showing off his art to bench, witness, jury, or audience. Yet how often such a spectacle is witnessed in courts!

Success in the art of cross-examination comes oftenest from happy possessors of a genius for it. Great lawyers have failed in the art, while mere "case lawyers" and those of mediocre learning have succeeded in it, quite as there is a difference between Thorwaldsen and the Italian constructor of plaster casts. Yet the art may be measurably acquired by observation of the ways and means and methods of masters at the Bar, and sometimes from the bench itself, in the art of cross-examination, an alchemy for testing truth or falsehood.—*A. Oakley Hall in the Green Bag.*

SUPERIOR COURT ABSTRACT.

Procedure—Saisie-gagerie accompanied by saisie-arrêt avant jugement en mains tierces—Service of writ on defendant—

Endorsement of writ.

Held:—1. Where the plaintiff has combined with a *saisie-gagerie simple* and *saisie-gagerie par droit de suite* a *saisie-arrêt en mains tierces*, without producing an affidavit to justify the *saisie-arrêt*, the omission of the affidavit merely entails the nullity of the seizure as respects effects not *gagés* for the rent, but does not affect the validity of the *saisie-gagerie*.

2. The fact that a copy of the declaration was deposited for the defendant at the prothonotary's office before the service of the writ of *saisie-gagerie* is immaterial, so long as the copy was in the office before the expiry of three days following the service of the writ.

3. The bailiff charged with a writ authorizing him to seize, is not bound to serve the copy of such writ upon defendant before effecting the seizure. The seizure may be effected in the absence of defendant and the writ subsequently served upon him.

4. The endorsement of its title or description upon the back of a writ is not an essential part thereof, and any difference in the title as endorsed upon the several copies served is not a ground of nullity.

5. The plaintiff is not bound to specify, in the writ or declaration of *saisie-gagerie*, the effects he seeks to have seized *par droit de suite*.

6. So long as the seizure of effects which have been removed from the premises is made within eight days after the date of their removal, it is not essential that the writ be served upon the defendant within eight days.—*Beaulieu v. Phillips et al.*, & *Kimball et al.*, T. S., Montreal, Doherty J., June 17, 1892.

Communauté—Clause de réalisation—Propres conventionnelles—

Art. 1385, C. C.

Par le contrat de mariage des intervenants, en date du 8 février 1858, il fut stipulé qu'il y aurait communauté d'acquêts entre les futurs conjoints, et que tout ce qui pourrait échoir à la femme par succession, donation, legs ou autrement, lui sortirait nature de propre à elle et aux siens de son côté, estoc et ligne.

Une somme d'argent étant échue à l'épouse par le testament de son père, un créancier du mari la fit saisir entre les mains du tiers-saisi qui la déposa en cour.

Jugé :—(Infirmant le jugement de la cour inférieure, Davidson, J., *dissentiente*) : 1. Que cette stipulation de propre n'a pas eu l'effet d'empêcher les biens ainsi réservés de tomber dans la communauté, mais qu'elle donne seulement à la femme le droit, lors de la dissolution de la communauté, de prélever, avant partage, la valeur de ces biens, avec préférence sur ceux qui seraient trouvés en nature.

2. Que le mari, comme chef de la communauté, peut disposer librement de tous les biens ainsi réservés par la femme, comme biens de la communauté, et que partant ces biens peuvent être saisis pour dettes du mari ou de la communauté.

3. Que dans l'espèce, pour enlever au mari le contrôle de ces biens, la femme aurait dû stipuler le droit exclusif d'administrer ces biens ou d'en disposer. *Veronneau v. Veronneau*, C. R., Montréal, Johnson, J.C., Davidson, Pagnuelo, JJ., 4 mars 1893.

Prescription—Action for bodily injuries—Minor—Interruption by judicial demand—Arts. 2262, 2269, 2224, C.C.

Held :—1. The prescription of the action for bodily injuries under Art. 2262, C.C., runs against minors as well as against persons of full age. (Art. 2269, C.C.)

2. A judicial demand or action has no effect to interrupt prescription, unless it be served upon the person whose prescription it is sought to hinder, before the expiration of the time required to prescribe.—*O'Connor et al. v. Scanlan*, S.C., Montreal, Doherty, J., 10 December, 1892.

Procédure—Signification de pièces.

Le rapport de signification de l'inscription au mérite était fait non sur l'inscription elle-même mais sur un papier qui fut ensuite annexé à cette inscription. De plus, l'huissier faisait rapport qu'il avait "signé à Bonin" sans dire quelle était la qualité de la personne à qui il avait remis cette inscription.

Jugé :—Que ce rapport de signification était irrégulier et que le jugement rendu sur cette inscription devait être mis de côté.—*McNamara v. Gauthier et al., & Bernard et al.*, en révision, Montreal, Johnson, C. J., Loranger, Davidson, JJ., 28 février 1893.

Absence—Curatelle à l'absent—Nouvelles de l'absent—Art. 92 C. C.

Jugé :—Les mesures ordonnées par la justice pour la protection des intérêts des absents, et notamment une curatelle à l'absent, sont de nature conservatoire et sont essentiellement favorables, et la connaissance de l'existence de l'absent, qu'aurait pu avoir, lors de l'ordonnance, un parent qui n'a pas assisté au conseil de famille, ne peut seule mettre fin à ces mesures. Il appartient, au contraire, aux tribunaux de maintenir ces mesures provisoirement lorsqu'ils jugent qu'il est de l'intérêt de l'absent qu'il en soit ainsi. L'absent, d'ailleurs, peut toujours faire cesser les effets de ces mesures par son retour ou sa procuration, mais tant qu'il ne juge pas à propos de le faire, elles peuvent être maintenues.—*Chaput v. Chaput, & Leclerc, es qual.*, intervenant, en révision, Montreal, Johnson, J. C., Jetté, Mathieu, J. J., 28 février 1893.

Servitude—Transfer—Signification.

Held :—1. A clause in a deed of sale, by which the purchaser of a portion of an immovable obliges himself towards his vendor, who retains the rest of the land, to do a particular thing, as, for example, to erect a fence on the part acquired by him, near the river which separates their respective portions, does not constitute a servitude on the purchaser's property, but merely imposes a personal obligation to construct a fence.

2. Although the vendor's right to compel the purchaser to conform to his obligation may be transferred by the vendor to anyone who subsequently acquires the portion of the land retained by him, the transferee has no right available against the purchaser above mentioned until a copy of the transfer has been duly served upon the latter.—*McCuaig v. Chenier*, Montreal, Doherty, J., November 14, 1892.

Libelle—Injure—Fuite et mauvaise réputation du demandeur—Mitigation de dommages.

Jugé :—La fuite et la mauvaise réputation du demandeur, qui réclame des dommages contre un journal, pour publication d'articles faux et diffamatoires, ne constituent pas une défense valable alors qu'il y a eu injure, et ne servent qu'à mitiger la condamnation que le tribunal aura à prononcer contre les propriétaires de ce journal.—*Brunet v. La Cie d'Imprimerie et de Publication du Canada*, en révision, Montréal, Jetté, Gill, Lorange, J. J., 31 janvier 1893.

Registration—Hypothec granted by purchaser before registration of his title—Priority.

Held :—Where a deed of sale of real property creating a bailleur de fonds right for the balance of the price, is not registered until after thirty days from the sale, and a hypothec on the property granted by the purchaser in the interval is immediately registered, the *bailleur de fonds* claim ranks before that of the hypothecary creditor.—*Roch v. Thouin*, C. R., Montreal, Johnson, C. J., Tait and Davidson, JJ., January 31, 1893.

COURT OF APPEAL ABSTRACT.

Diffamation—Droit de défense—Vérité des propos diffamatoires.

Jugé :—1. Le défendeur, dans une action en dommages pour diffamation, est admis à plaider la vérité et la notoriété des faits dont l'imputation constitue le propos diffamatoire, cause de l'action.

2. Il en est autrement du caractère et de la conduite générale de celui à qui le propos diffamatoire se rapportait. Ils ne peuvent être invoqués comme moyen de défense.—*Beauchêne & Couillard, Baby, Bossé, Blanchet, Hall et Wurtele*, JJ., Québec, 4 avril 1893.

Assurance contre le feu—Droits et recours de l'assureur—Subrogation conventionnelle et légale aux droits de l'assuré—Responsabilité de l'auteur du sinistre—Preuve—Arts. 1155, 1156, 2584, 1053, C. C.

Jugé :—1. La preuve faite incidemment sur une inscription de faux forme partie du dossier à toutes fins, et le demandeur peut l'invoquer, au mérite, au soutien des allégations de son action.

2. L'assureur qui a payé le montant de l'assurance en deux versements (dont le dernier au moyen d'un billet promissoire) à l'assuré, ne peut obtenir de ce dernier, au moment du deuxième versement, une subrogation conventionnelle de ses droits contre l'auteur du sinistre, les termes de l'art. 1155, C. C., "cette subrogation doit être expresse et faite en même temps que le paiement," s'y opposant.

3. Cet assureur ne pouvant être rangé sous aucun des cinq chefs de l'art. 1156, C. C., ne peut invoquer, non plus, la subrogation légale aux droits de l'assuré contre l'auteur du sinistre.

4. Aucune cession des droits de l'assuré n'ayant été faite à l'assureur lors du paiement de l'assurance, ce dernier ne peut pas invoquer contre l'auteur du sinistre le bénéfice de l'art. 2584, C. C.

5. L'assureur qui a payé le montant de l'assurance à l'assuré, a, pour se faire rembourser, contre l'auteur du sinistre, le recours en dommages de l'art. 1053, C. C.—*Cedar Shingle Co. & La Compagnie d'Assurance, etc., de Rimouski*, Baby, Bossé, Blanchet, Hall et Wurtele, JJ., Québec, 20 juin 1893.

Testament—Forme de testament—Testament fait à l'étranger—Legs—Interprétation—Procédure—Droit d'invention—Institution de charité.

Jugé :—1. L'ancien droit français, en force dans la province avant la promulgation du code civil, ne reconnaissait le testament fait à l'étranger qu'autant qu'il était fait dans la forme pourvue par la loi du pays où se trouvait le testateur, suivant la maxime, '*locus regit actum*.'

2. Les lois de l'Etat de New-York, en 1865, permettant aux étrangers de disposer par testament, suivant les formes autorisées par les lois de leur domicile, le testament olographe fait alors par une personne domiciliée à Québec est valable.

3. La disposition testamentaire conçue en ces termes : "I hereby will and bequeath all my property, assets and means of any kind to my brother Frank who will use one half of them for public Protestant charities in Quebec and Carluke, say, the Protestant Hospital Home, French Canadian Missions, and amongst poor relations, as he may judge best," est valide et ne saurait être attaquée comme vague et incertaine, comme ne désignant pas suffisamment les bénéficiaires, ni comme laissée à la discrétion du légataire, Frank Ross.

4. Dans une action intentée pour faire prononcer la nullité d'un testament qui contient un legs en faveur d'individus, au choix du légataire universel, appartenant à des classes ou catégories désignées, tous ceux sur lesquels ce choix pourrait légalement tomber ont un intérêt suffisant pour être admis parties intervenantes.

5. Une maison d'éducation est une institution de charité dans le sens de la disposition testamentaire ci-haut citée.—*Ross & Ross*, Québec, Sir A. Lacoste, J.C., Baby, Blanchet, Hall et Wurtele, JJ., 4 mai 1893.

GENERAL NOTES.

SCUTTling SHIPS.—In the High Court of Justiciary in Edinburgh, before Lord Kyllachy, on August 8, David Hobbs, shipbroker in Dundee, and Joseph Severn, ship-captain, were indicted for scuttling four ships off the Scotch coast, and with setting fire to a fifth in Inverkeithing Harbour—in each case with intent to defraud insurers. Hobbs pleaded guilty as to two vessels and Severn as to one. Severn appears to have been employed by Hobbs as his tool in effecting his frauds on underwriters, and in consideration of his subordinate position only received five years' penal servitude, whereas Hobbs was sentenced to seven years. No serious danger to life seems to have been involved by their operations, or the punishments would be inadequate. The *modus operandi* seems to have been the old-fashioned plan of boring holes in the ship's side, plugging them, and drawing the plugs when out at sea.

MISTAKEN IDENTIFICATION.—A very curious case has come under the notice of the Coroner for Bombay, Allan F. Turner. On Sunday week a police ramoosee doing duty at the Greaves Cotton Mills at De Lisle Roads, while going his rounds discovered the body of a young Hindoo lying face downwards in a pool of water and mud by the roadside. The police caused a battaki to be beaten in the usual way, and among others the family of a man who had been missing for some days came forward. A woman at once identified the body as that of her son Sakhia Mulhari, a mill hand, about twenty years of age, and two other sons also identified it. An inquest was held in due course, and evidence was tendered to the effect that the lad was a mill hand, but had been very sick for the past two or three months. He was discharged from the Jamssetjee Jejeebhoy Hospital about a fortnight before, and was then very feeble, and only able to walk with difficulty. On Saturday he was seen limping along in the direction of Curroy Road, and on the following day came the discovery made by the ramoosee.—A verdict was returned in accordance with the testimony to the effect that Sakhia had come to his death by falling face downwards in a pool of mud while in a feeble state of health, and the body was then taken away to the burning ghats. Before the funeral party reached the ghat, however, a younger member of the family stopped it with the cry, 'Sakhia's come home!' And so it proved. The dead man, despite his identification by Sakhia's relatives, was not Sakhia at all; and after a second inquest had been held, he was finally disposed of as unknown.

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SUPREME COURT OF CANADA.

OTTAWA, 24 June, 1893.

COWEN v. EVANS.

Quebec.]

*Appeal—Amount in controversy—R. S. C. ch. 135—54-55 Vic. ch. 25
—Costs.*

C. brought an action against E. claiming 1o. that a certain building contract should be rescinded. 2o. \$1900 damages 3o. \$545 for value of bricks in possession of E. but belonging to C. The case was *en délibéré* before the Superior Court when 54-55 Vic. ch. 25 amending ch. 135 R. S. C. was sanctioned, and the judgment of the Superior Court dismissed C's claim for \$1000 but granted the other conclusions. On appeal to the Court of Queen's Bench by E., the action was dismissed in 1893. C. then appealed to the Supreme Court.

Held, that the building for which a contract had been entered into having been completed over five years ago, there remained but the question of costs and the \$545 claim for bricks in dispute between the parties, in the judgment appealed from, and that amount was not sufficient to give jurisdiction to the Supreme Court under R. S. C. ch. 135, sec. 29. (See *Moir v. Corporation of Huntingdon*, 19 Can. S. C. R. 363.)

Appeal quashed with costs.

Smith, for motion.

Archibald, Q. C., contra.

COWEN v. EVANS.

24 June, 1893.

Quebec.]

*Jurisdiction—Amount in controversy—54-55 Vic. ch. 25, sec. 4.—
Appeal—Right to.*

On the 30th September, 1891, when the Statute 54-55 Vic. ch. 25, sec. 4, was passed, enacting that the amount demanded and not that recovered should determine the right to appeal when the right to appeal is dependent upon the amount in dispute, the Superior Court had *en délibéré* an action of damages brought by the respondent against the appellant for \$3050 of damages.

The Superior Court on the 5th December, 1891, dismissed the respondent's action.

On appeal to the Court of Queen's Bench for Lower Canada (appeal side) the Court on the 23rd February, 1893, reversing the judgment of the Superior Court, granted \$880 damages to respondent with interest from the 16th June, 1887.

On appeal to the Supreme Court of Canada :

Held, that the Statute 54-55 Vic. ch. 25, did not apply to cases pending, and as the amount of the judgment appealed from was under \$2,000 the case was not appealable, following on the question of the non-retroactivity of the Statute, *Williams v. Irvine*, (22 Can. S. C. R. 108) and as to the amount in dispute, *Monette v. Lefebvre*, 16 Can. S. C. R. 357.

Gwynne, J. dissenting.

Appeal quashed with costs. (1)

Mr. Smith, for motion.

Archibald, Q. C., contra.

24 June, 1893.

MITCHELL v. TRENHOLME.

Quebec.]

Jurisdiction—Appeal—Right to—Amount in dispute—54-55 Vic. ch. 25, sec. 4.

In an action brought by the respondents on the 25th July 1889, claiming \$5,000 damages alleged to have been sustained by them by the production of a plea and incidental demand by

(1) The appeal of *The Montreal Street Railway Co. v. Carrière*, argued at the October Session, 1893, was quashed on the same grounds.

appellants in a case before the Superior Court for the district of Montreal, under number 528, the Superior Court on the 27th day of September, 1890, granted \$300 damages to the respondents.

The appellants (defendants) then appealed to the Court of Queen's Bench and that Court on the 28th day of February 1893, confirmed the judgment of the Superior Court.

On appeal to the Supreme Court of Canada :

Held, following the decision in *Williams v. Irvine*, 22 Can. S. C. R. 108, that 54-55 Vic. ch. 25, did not apply to cases *en délibéré* before the Superior Court on the 30th September, 1891, and the appeal should be quashed for want of jurisdiction. Gwynne, J., dissenting.

Appeal quashed with costs.

Buchan, for motion.

Delisle, contra.

24 June, 1893.

MILLS et al. v. LIMOGES.

Quebec.]

Right of appeal—54-55 Vic. ch. 25, sec. 4—*Amount in dispute*—*Jurisdiction*.

In an action of damages for \$5,000 brought for the death of a person by a consort, the Superior Court in April, 1891, granted \$1,000 damages and the judgment was acquiesced in by the plaintiff, but defendant appealed to the Court of Queen's Bench and that Court affirmed the judgment of the Superior Court in December, 1892. 54-55 Vic. ch. 25, sec. 4, declaring that " whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," was sanctioned 30th September, 1891.

On appeal to the Supreme Court of Canada :

Held, that 54-55 Vic. did not apply to such a case, and that the case was not appealable. *Monette v. Lefebvre*, (16. Can. S. C. R. 357); *Williams v. Irvine*, (22 C. S. R. 108).

Appeal quashed with costs.

H. Abbott, Q. C., and *E. Lafleur*, for appellants.

Demers, for respondent.

24 June, 1893.

LEFEUNTUN v. VERONNEAU.

Quebec.]

Venditioni exponas—Order of Court or judge—Vacating of Sheriff's sale—Arts. 553, 662, 663, 714 C. P. C.—Jurisdiction.

A petition *en nullité de décret* has the same effect as an opposition to a seizure, and under arts. 662 and 663 C. P. C. the sheriff cannot proceed to the sale of property under a writ of *venditioni exponas* unless said writ is issued by an order of the Court or a judge.—*Bissonnette v. Laurent* (15 Rev. Leg. 44) approved.

Per Fournier, J.—Where the text of the law is clear and positive, a practice even long established should not be followed. Taschereau and Gwynne, JJ., dissented.

On the question of want of jurisdiction raised by respondent it was held that a judgment in an action to vacate the sheriff's sale of an immovable is appealable to the Supreme Court under sec. 29 (b). *Dufresne v. Dixon* (16 Can. S. C. R., 596) followed.

Appeal allowed with costs.

Mercier, Q. C., and *Gouin*, for appellant.

Bonin, for respondent.

24 June, 1893.

QUEBEC CENTRAL RY. CO. v. LORTIE.

Quebec.]

Railway accident to passenger—Damages—Negligence—
Art. 1675 C. C.

L. was a holder of a ticket, and passenger of the company's train from Levis to Ste. Marie Beauce. When the train stopped at Ste Marie Station, passengers alighted, but the car upon which L. had been travelling, being some distance from the station platform, and the time for stopping having nearly elapsed, L. got out at the end of the car, and, the distance to the ground from the steps being about two feet and half, in so doing he fell and broke his leg, which had to be amputated.

The action was for \$5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment

in favour of L. for the whole amount. On appeal to the Supreme Court of Canada,

Held, reversing the judgments of the Courts below, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident being wholly attributable to L's own default in alighting as he did, he could not recover. Fournier, J., dissenting.

Per Gwynne, J.—Every man travelling by rail in this country must have known that it was not the way he should have alighted, or by which there was any necessity for his so alighting, or was ever intended that he should alight.

Appeal allowed with costs.

Brown, Q. C., for appellants.

Lavery, for respondent.

24 June, 1893.

STEWART V. ATKINSON.

Quebec.]

Sale of deals—Contract—Breach of—Delivery—Acceptance—Quality—Warranty as to—Damages—Arts. 1073, 1473, 1507 C. C.

In a contract for the purchase of deals from A. by S. *et al*, merchants in London, it was stipulated *inter alia*, as follows:—"Quality—Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand," and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts payable in London 120 days sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros. at the request of P. & P. intending purchasers of the deals. When the deals arrived in London they were inspected by S. *et al*, and found to be of inferior quality, and S. *et al*, after protesting A. sold them at reduced rates. In an action of damages for breach of contract,

Held, reversing the judgment of the Court below, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Arts. 1507, 1473, 1073 C. C. The Chief Justice and Sedgewick, J., dissenting.

Appeal allowed with costs.

Fitzpatrick, Q. C., and *Ferguson, Q. C.*, for appellants.

Casgrain, Q. C., for respondent.

1 May, 1893.

C. P. R. Co. v. COBBAN MANUFACTURING CO.

Ontario.]

Practice—Trial—Disagreement of jury—Questions reserved by judge—Motion for judgment—Amendment of pleadings—New trial—Judicature Act., rule 799—Jurisdiction—Final judgment.

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage, the judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved in the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the Court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial but was not tried before the Divisional Court pronounced judgment on the motion, dismissing plaintiffs' action. On appeal to the Court of Appeal from this judgment of the Divisional Court it was reversed. On appeal to the Supreme Court,

Held, affirming the judgment of the Court of Appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the Court, under rule 799, to finally put an end to the action.

Held, also, that the judgment of the Court of Appeal, ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorising an appeal from judgments not final.

Appeal dismissed with costs.

Nesbitt, for appellants.

J. Osler, Q. C., and *Holden*, for respondents.

24 June, 1893.

CORPORATION OF THE VILLAGE OF NEW-HAMBURG v. COUNTY OF
WATERLOO.

Ontario,]

Ontario Municipal Act—Construction of bridges—Liability for construction and maintenance—Width of stream—R. S. Q. (1887) ch. 184 sec. 532, 534.

By the Ontario Municipal Act, R. S. Q. (1887) p. 184 sec. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county," and by sec. 534 the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams of one hundred feet or less in width bridges must be constructed and maintained by the respective villages through which they flow.

The river Nith flows through the village of New-Hamburg and in dry seasons when the water is low the width of the river is less than one hundred feet, but after heavy rains and freshets, it exceeds that width.

Held, reversing the decision of the Court of Appeal (20 Ont. App. R. 1) and of the Divisional Court (22 O. R. 193) that the width at the level attained after heavy rains and freshets in each year should be considered in determining the liability under the act to construct and maintain a bridge over the river; the width at ordinary high water mark is not the test of such liability.

Appeal allowed with costs.

Meredith, Q. C., for the appellants.

King, Q. C., for the respondents.

24 June 1893.

CITY OF LONDON v. WATT.

Ontario,]

Assessments and taxes—Ontario Assessments Act, R. S. O. (1887) ch. 19, ss. 15, 65—Illegal assessment—Court of revision—Business carried on in two municipalities.

Sec. 65 of the Ontario Assessment Act (R. S. O. 1887, ch. 193)

does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Sec. 15 of the act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such person shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W. residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London.

Held, affirming the decision of the Court of Appeal, that W. did not carry on business in London within the meaning of the said section, and his merchandise in the warehouse was not liable to be assessed at London.

Appeal dismissed with costs.

Meredith, Q. C., for the appellants.

Gibbons, Q. C., for the respondents.

24 June, 1893.

INTERNATIONAL COAL CO. v. COUNTY OF CAPE BRETON.

Nova Scotia.]

*Assessment and taxes—Tax on Railway—Nova Scotia Railway Act
—Exemption—Mining Company—Construction of Railway by—
R. S. N. S. 5 Ser. ch. 53.*

By R. S. N. S. 5 ser. c. 53, sec. 9, sec. 30, the road-bed, etc., of all railway companies in the Province is exempt from local taxation. By sec. 1 the first part of the act from secs. 1 to 33 inclusive applies to every railway constructed and in operation or thereafter to be constructed under the authority of any act of the legislature, and by sec. 4, part 2 applies to all railways constructed or to be constructed under authority of any special act, and to all companies incorporated for their construction and working. By sec. 5, subsec. 15, the expression "the company" in the act means the company or party authorized by the special act to construct the railway.

The International Coal and Ry. Co. was incorporated by 27 Vic. ch. 42 (N. S.) for the purpose of working coal mines in Cape Breton, and for the further purpose "of constructing and making such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation on railways." Under these powers a railway twelve miles in length was built and used to carry coal from Bridgeport to Sydney Harbour, and the Company having become involved its property, including said railway, was sold at sheriff's sale and the purchasers conveyed the same to the International Coal Co.

By 48 and 49 Vic., ch. 20 (a) it was enacted that the International Coal Co. might hold and work their railway for the purposes of their own mines and operations, and might hold and exercise such powers of working the railway for the transport of passengers and freight generally for others for hire as might be conferred on the company by the legislature of Nova Scotia, and by 49 Vic., ch. 145, sec. 1 (N. S.) the company were authorized to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of ch. 53, R. S. N. S., 5 ser., entitled "of railways."

The municipality of Cape Breton having assessed the company for local taxes in respect of said Railway,

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the company was exempt from such taxation; that the railway was one constructed under authority of an act of the legislature of Nova Scotia (27 Vic., ch. 42) and in operation under the authority of another act (49 Vic. ch. 145); that the company was a "railway company" within the meaning of sec. 9, subsec. 30 of c. 53; that part one of that chapter applies to railways constructed under any act of the legislature and not only under acts exclusive of those to which part two applies; and that the reference in 49 Vic., ch. 145, sec. 1 to part two does not prevent said railway from coming under the operation of the first part of the act.

Appeal allowed with costs.

Harris, Q. C., for the appellants.

Borden, Q. C., for the respondents.

June 24, 1893.

YORK V. CANADA ATLANTIC STEAMSHIP CO.
Nova Scotia.]

*Negligence—Passenger vessel—Use of wharf—Invitation to public—
Accident in using wharf—Proximate cause—Excessive
damages.*

A company owning a steamboat making weekly trips between Boston and Halifax occupied a wharf in the latter city leased to heir agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf, which narrowed after some distance and formed a jog, on reaching which Y's wife tripped and as her husband tried to catch her they both fell into the water. Forty-four days afterwards, Mrs. Y. died.

In an action by Y. against the company to recover damages occasioned by the death of his wife, it appeared that the deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked:—Would the deceased have recovered, notwithstanding the accident, if she had had regular attendance? replied, "very doubtful." A verdict was found for the plaintiff with \$1,500 damages, which the Supreme Court of Nova Scotia set aside and ordered a new trial. On appeal from that decision:

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation to see that they were safe.

Held, further, that it having been proved that the wharf was

only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company whose officers had sole control of it, the company was in possession of it at the time of the accident.

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y's death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed.

Appeal dismissed with costs.

Newcombe, for appellant.

Borden, Q.C., for respondents.

24th June, 1893.

TOWN OF PRESCOTT v. CONNELL.

Ontario.]

Negligence—Proximate cause—Danger voluntarily incurred.

C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team, while he interviewed the proprietor of the yard. Shortly after a blast went off, and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury.

Held, affirming the decision of the Court of Appeal (20 Ont. App. R. 49), Gwynne, J. dissenting, that the negligent manner in which the blast was set off was the proximate and direct cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances.

Appeal dismissed with costs.

Meredith, Q.C., for appellants.

Murcheson, Q.C., for respondent.

INDIANA SUPREME COURT.

June 13, 1893.

EBERHART V. STATE.

Rape—Resistance—Evidence.

Defendant, a quack, pretending to cure by charms, after several times visiting a girl thirteen years old, who had for two years had epileptic fits, was placed in a room with her, at his instance, by her ignorant and credulous parents, where, on the fifth night, he called her to his bed, telling her he had something to tell her which would cure her. Her testimony that she tried to make him quit, but he would not, was uncontradicted. Held, that there was not a failure to show sufficient resistance because she made no outcry, and concealed the crime committed on her.

Appeal from Circuit Court, Clinton county; S. H. Doyle, J. Lewis Eberhart was convicted of rape, and appeals.

HOWARD, J. The appellant was indicted for the crime of rape, was tried therefor, and found and adjudged guilty. It is contended that the evidence does not sustain the verdict. The prosecuting witness, Lottie G. Mohler, was thirteen years of age, past, and for two or three years had been subject to epileptic fits. Her father was a day laborer, while both father and mother were ignorant and credulous to an extreme degree, though apparently well-minded persons. The girl herself had not gone to school since she had been afflicted with epilepsy, and had gone out nowhere except when accompanied by her father.

Appellant was a pretended travelling doctor, and about fifty years of age. He had travelled over parts of Illinois and Michigan, as well as in this State, professing to cure diseases by charms or spells, but not laying claim to any great medical knowledge. The parents of the prosecuting witness were advised to make trial of his powers to relieve her of her malady, and called him to treat her during one of his visits to the neighborhood. His first treatment was to take her to a private room and tie a string of woollen yarn around her person, charging her to tell no one what he had done. She did not tell this to her mother, and the mother did not want to know what the doctor had done when she learned that he told the girl not to tell. This was in December, 1892. In January, and also in February, he came again, and the treatment was repeated. Before the February visit he wrote the following letter to the mother:

PERTH, IND., Feb. 1, 1893.

"MRS. MATTIE MOHLER:

"This night I received your letter, and would say it would be necessary for me to see her again, and sleep in the same room with her now and then. You will see the change, for I make it a point to operate on these cases the third time after night, and, if possible, when the spell is on. It is possible that I may see you before Saturday night, and have a room to ourselves.

Yours truly,

"LEWIS EBERHART.

"Try and get out of her what makes her cry. I am of a notion that her disease is a curse. Does she make any religious profession, or not? Look for me, and ask her if she is very anxious to see me, or not. I will use Latin phrases altogether on behalf of her.

Yours,

"L. E."

The parents consented to this astounding proposition. The prosecuting witness slept in a small room down stairs on a couch, while the doctor slept in the same room on a bed. The rest of the family slept upstairs. On the fifth night that they so slept in the same room, he waked her up, after she had been some time asleep, and called her to his bed, saying he had something to tell her that would cure her of her fits. As soon as she reached his bed, she testifies, he pulled her in, and committed the crime charged; she trying, as she says, "to make him quit, but he would not do it." Her mother and sister-in-law found evidence of the truth of her statement, although at first she refused to tell, because, as she says, the doctor forbade her to say anything about it.

Appellant's counsel say that the crime is not proved, because there was no outcry at the time, and there was concealment for a few days afterward. In *Anderson v. State*, 104 Ind. 467, it is said: "The nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend very much upon the peculiar circumstances attending it; and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance. *Ledley v. State*, 4 Ind. 580; *Pomeroy v. State*, 94 id. 96; *Com. v. McDonald*, 110 Mass. 405; 2 Bish. Crim. Law, §1122." In the case of *Ledley v. State*, *supra*, the court said: "What seemed inconsistent in her conduct might

have been accounted for, in the minds of the jury, by that species of moral duress which the evidence tends to show that the prisoner exercised over her. She was young—only sixteen—and seemingly artless, wholly inexperienced, and by no means intelligent. * * * Under such circumstances, his influence over her must have been great. * * * The jury saw the witnesses and the parties. They have come to a conclusion which in our view of the case, is perhaps supported by the evidence. * * * Unless we respect such verdicts, there would be little hope of bringing the guilty to punishment. Bish. Crim. Law, *supra*, says: "Some of the cases, both old and modern, are quite too favorable to the ravishers of female virtue, and ought not to be followed, on this question of resistance. * * * The better judicial doctrine requires only that the case shall be one in which the woman 'did not consent.' Her resistance must not be mere pretense but in good faith." In *Huber v. State*, 126 Ind. 135, the court held that "the rule does not require that the woman shall do more than her age, strength and the attendant circumstances make it reasonable for her to do in order to manifest her opposition.

Pomeroy v. State, 94 Ind. 96, 7 Leg. News, 278, was a case in many respects similar to that before us. In that case the prosecuting witness, who was twenty-one years of age, was afflicted with epileptic fits, and Pomeroy was an itinerant doctor, who said he could cure her, and in pretending to treat her as a physician, accomplished her ruin. She too made no outcry at the time, but the court says: "If the jury believe, as they might well have done, under the evidence, that the appellant, as a physician, obtained possession and control of Rebecca's person, under her mother's command * * * and that she never in fact gave her consent, through fraud or otherwise, * * * then it seems to us that the appellant was lawfully convicted of the crime of rape." *Queen v. Flattery*, 2 Q. B. Div. 410, referred to in the same opinion, was also similar to the case before us. In the case at bar the prosecuting witness was a child but little over the age of consent, as then fixed by law, and under such age as now fixed by our more humane statute. She was an epileptic, and had been so afflicted for about two years. In obedience to the direction of her parents, she was placed in the power of the charm doctor, who had wormed himself into her confidence, and into that of her almost equally feeble-minded parents. Her uncon-

tradicted statement shows that she did not give her consent, and that she "tried to make him quit, but he wouldn't." The appellant claimed to exercise great influence over her, and the evidence showed that she obeyed him implicitly, as one who was to cure her of her malady. Weak in intellect and credulous, as she was, both from disease and heredity, and subjected for months to the will of her pretended physician, it was rather a matter of surprise that she offered any resistance to him. The crime committed by appellant was not only rape, as the jury found, but of a most aggravated character; and the jury would have been justified, from the evidence, in inflicting the most severe penalty.

The eighth instruction asked by appellant was properly refused by the court. We think it clear, from what has been already said, that a charge would have been improper which assumed that, under the circumstances, the prosecuting witness ought to have made an outcry that would have waked her parents upstairs. Nor do we think the evidence would justify that part of the instruction which assumed that appellant was received by the family on friendly terms on one occasion after the commission of his crime. What we have said before applies also to this last feature of the instruction refused.

Appellant also contends that he should have been allowed to call and cross-examine the prosecuting witness after the case of appellee had been closed. The court permitted appellant to make the prosecuting witness his witness, for the purpose of eliciting any further evidence she might be able to give. This was all he was entitled to. Appellee's witnesses could not be cross-examined after appellee's case was closed, and without the consent of appellee and of the court. We have found no available error in the record.

The judgment is affirmed.

GENERAL NOTES.

EXCENTRICITIES OF PRACTICE IN VIRGINIA.—A Lynchburg, Va., special, August 11, says: "Yesterday afternoon, during the trial of Hugh J. Shott against the Norfolk and Western Railroad, the opposing counsel, J. C. Wysor and General James A. Walker, became involved in a difficulty by Walker accusing Wysor of appealing in his speech to the passion and the prejudice of the

jury. Wysor gave Walker the lie. Walker asked for a knife, and Wysor drew his knife and handed it to him. Walker refused the proffer, and borrowed one from a bystander, and the fight commenced. Several blows were struck and Wysor was stabbed in his shoulder, and his face was slit from his mouth to his ear. Wysor then borrowed a gun and tried to force Walker's room door to shoot him, when both were arrested and put under a bond of \$5,000. Wysor is badly hurt. Both men are among the most prominent lawyers in south-western Virginia."

OFFENCES COMMITTED BY MINORS.—A boy of sixteen has been sentenced to death at Leeds, in England, for the murder of his infant brother. Commenting on this sentence, the *St. James Gazette* observes that, "of course" the young convict will not be hanged, but that equally of course, he will be kept in penal servitude for life. In some countries, *e. g.*, in Prussia, Spain, and parts of Switzerland, capital punishment is not inflicted on young persons, the ages of liability being sixteen, eighteen, and twenty respectively, and even in England, where any boy or girl above the age of seven can be capitally convicted and executed, if only *malitia supplet aetatem*, it is doubted whether any person under the age of seventeen has been hanged for the last fifty years. However this may be, the *London Law Times* says that the life sentence in cases of commutation is merely a nominal one, and that the culprit usually regains his liberty after a period of some twenty years, though the practice of the home office in this matter is wisely not expressed in any general rules such as those which followed the passing of the Penal Servitude Act 1891, and apply to sentences of penal servitude for fixed periods, which are invariably less than the nominal periods if only the convict's behavior is good.

HYPNOTISM.—Hypnotism has been brought to the notice of a court in the State of Washington, where, at Tacoma, the complainant in a suit for damages is accused of hypnotizing a witness in court. The plaintiff is said to have given evidence of mesmeric power on many previous occasions. The court at first declined to receive the complaint, but seems to have taken it under advisement and the case was adjourned. The witness showed a deficient memory, which was said to improve when some one stood between him and the alleged hypnotizer.

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CURRENT TOPICS AND CASES.

In England, if a question of interpretation of a statute be submitted to a court of appeal, and be decided unanimously by that court, the judgment is, by usage, binding on all inferior tribunals. Here appellate decisions do not appear to be accepted as conclusive, and hence questions which after a good deal of debate have apparently been finally settled by a judgment of the court of appeal, are apt to be raised again a few years later, when the battle has to be fought over again. *Roch v. Thoun*, 3 C. S. 141, furnishes an illustration. The Court of Review at Montreal has gone very fully into a question which had apparently been settled for ever (unless changed by the legislature) in *Pacaud v. Constant*, 4 Q. L. R. 94, a dozen years ago. The judgment of the Court of Review in *Pacaud v. Constant* was rendered after a very full examination of the question, and is reported at length. That decision was unanimously affirmed in appeal by five judges. Probably the judges of the court of appeal did not think it necessary to express their views in writing, as they were simply affirming what had been decided by the Court of Review. At all events the decision in appeal does not appear in the reports. It is noted, however, under the title of *Pacaud & Aikman*, in Mr. Justice Ram-

say's digest, p. 598, as follows: "Hodges sold land to defendant Constant, 30th May, 1871. The vendor failed to enregister till the 30th June. On the 28th June, Constant gave a hypothec over the land to Pacaud who registered the same day. Pacaud claimed to be entitled to rank on the proceeds of the land prior to the representatives of Hodges, but the court held, confirming the judgment of the Superior Court, that Constant could not give any hypothec over the land till his own title was registered." A reference to the factums in appeal shows that this was the sole question submitted to the appellate court, and Chief Justice Meredith's opinion (4 Q. L. R. 94) is printed *in extenso* in the respondent's factum. We have referred to the collection of factums of the late Mr. Justice Ramsay, to see whether they contained a written opinion, and we find the following note of the case:—

"On the 30th May, 1871, James Hodges sold to the defendant a piece of real estate. He did not register till the 30th June, one day more than the thirty days allowed by law to preserve his hypothec. On the 28th June, Constant's title not being registered, Constant granted an hypothec in favor of opposant over the land in question, which was registered the same day. The question which arises in this case is whether the prior registration of appellant's hypothec can prevail, Constant's title not being registered, in face of the last clause of Art. 2098, C. C. It would have been sufficient to have registered it by memorial. See case at Quebec of security on land, title not registered. See also the case of *Banque du Peuple & Laporte*. (Confirmed, 4 Sept. 1878, Dorion, C.J., Monk, Ramsay, Tessier, Cross, JJ.)"

This is quite conclusive that the Court of Appeal did unanimously decide in the same sense as the Court of Review, yet there have been several contrary decisions since by judges sitting alone. On a point like this, on which so much may be urged in favor of either conclusion, and which so deeply concerns civil rights, is it not better to

have a fixed rule than to suffer uncertainty to continue, and is it not therefore a fair case for the legislature to declare the law, and to remove the ambiguity and difficulty which judicial interpreters have found in the articles of the code?

In *Central Vermont Ry. Co. & La Compagnie d'Assurance Mutuelle, etc.*, the Court of Queen's Bench, Montreal, June 23, 1893, in reversing the judgment of the court below, laid down a rule of considerable importance with reference to actions *en garantie*. It was held that to give rise to an action *en garantie simple*, not only must there be connexity between it and the principal action, but the two actions must be identical in their nature and based upon similar legal principles. So, where, as in the case before the court, an insurance company is sued upon a policy of fire insurance for the amount of a loss, an action *en garantie* will not lie against a railway company through whose alleged fault and negligence the fire occurred, the liability on which the action is based in the two cases being entirely dissimilar in nature and principle. The action against the insurance company is based upon the contract of insurance, while the action against the railway company is not based upon any contract, but upon the liability established by Art. 1053 of the Civil Code.

During the October term of the Court of Queen's Bench sitting in appeal at Quebec, twenty appeals were heard. On the 27th of the month the Court met to render judgments. Seventeen of the cases which had been heard a few days before were then disposed of, and only three remained *en délibéré*.

THE LATE SIR J. J. C. ABBOTT.

The late Sir John Abbott like another successful and prominent member of the Montreal bar—the late Sir John Rose—was a native of this province—the first who has attained the position of

premier of Canada since confederation. Great as were his attainments in the law he possessed most of the qualities which would have made him equally successful in any other profession—an acute intellect, orderly arrangement and lucid exposition of ideas, immense application and capacity for work, with careful attention to the details of it. If he did not satisfy the popular notion of a brilliant orator it was rather that he cared little for that sort of popularity, or had no time to cultivate the flowers of rhetoric. But as an argumentative and persuasive speaker he was excelled by few either in this country or among the members of the English bar. His style of pleading was admirably clear and never failed to engage the attention of the Court he was addressing. With a jury he had perhaps less weight, though always making a favorable impression. We once had an opportunity of contrasting his style with that of the late Sir John Rose. It was a case tried with a special jury—the last occasion, we think, on which Mr. Rose appeared in a jury action. The case had no sensational feature whatever: the jury had merely to determine certain questions of fact. But Mr. Rose managed to develop considerable enthusiasm and to get into a warm struggle with the presiding judge over some of his rulings. There was no responsive warmth on Mr. Abbott's side; he remained impassive—wisely considering perhaps that the case was better left in the hands of the judge. The jury, however, gave the verdict to Mr. Rose.

As mayor of Montreal a few years ago, and as leader for the Government in the Senate shortly afterwards, Mr. Abbott acquitted himself wonderfully well, showing a mastery of every question that came up, however intricate or troublesome. Then, later, when the sudden removal of Sir John Macdonald left the conservative party for a time without an acknowledged leader, he accepted the difficult position of premier, and was marvelously successful in dealing with the problems which present themselves in the government of a rapidly growing country. His intense application to this task, at an age when physical strength was on the decline, undoubtedly exhausted his remaining forces and probably shortened his life.

When Mr. Abbott was elected mayor of Montreal half a dozen years ago we remarked (vol. 10, p. 73) that he would have been more appropriately placed as the chief justice of a high appellate court. Few anticipated at that time that he would yet be sum-

moned to a higher and more difficult presidency, and would hold the position of first minister when the office of Chief Justice of the Court of Appeal had to be filled. Nevertheless, we shall always hold that Mr. Abbott would have rendered invaluable service to the country had he obtained a high judicial position in the prime of life. There was a time in his career when it would not have been unacceptable; but it has to be admitted that the niggardly salary accorded to our judges would not have attracted him after he had attained prominence as a commercial lawyer.

Mr. Abbott was an old parliamentarian. Long before confederation he had a seat in parliament. But his attention was given chiefly to such measures as were connected with commercial law. The Insolvent Act of 1861 was his greatest achievement and it also redounded to his professional advancement. Even before this time (in 1862) he was solicitor-general for Lower Canada, and it may be mentioned as an example of his thoroughness as a worker, that he at once assumed personally the conduct of the crown prosecutions, though not previously known in connection with criminal cases.

A hard worker throughout his life, he probably would not have reached an age exceeding the three score and ten, had he not possessed that love of nature and of open air recreations which is usually found in those who have been born and brought up in rural scenes, and he made opportunity for these relaxations even when occupations pressed heavily upon every moment of his time.

JUDICIAL RE-ORGANIZATION.

The following is a report of remarks made at the recent interview of a delegation from the Montreal Bar with the Attorney-General:—

Mr. John Dunlop, Q.C., bâtonnier, having been requested by the Attorney-General to state his views respecting the proposed Bill "Respecting the re-organization of the Law Courts," said that he was not favorable to the Bill for the following reasons:

1st. Because he saw no reason why the judicial business of this Province could not be effectually carried out, provided there was a fair distribution of work made among the thirty judges in the Province.

That so far as regards the district of Montreal, the Bar had two grievances to contend with :

Firstly. The difficulty in getting cases heard in the Court of Appeals; and

Secondly. The difficulty in getting cases heard at *enquête* and merits. He suggested as regards the first difficulty, that it might be provided that the Court of Appeals sit in two divisions, and that the quorum should be reduced to three. If this method were adopted, in a short time the arrears would be wiped off. Of course this would necessitate the appointment of additional Judges in Appeal. He suggested that the right of appeal to the Court of Queen's Bench, should be limited to cases over \$400.00, except in special and exceptional cases when an appeal might be granted by the Court on application. As regards *enquête* and merits, he saw no reason why that Court should not sit in three divisions in the City of Montreal.

He alluded, of course, to the great difficulty there had been in carrying on the business of the Courts in Montreal, during the past two years, owing to the repairs being made to the Court House, but there was a prospect of these repairs being finished, and he had been informed by the Prothonotary that there would be plenty of room in a short time for three divisions of the Court to sit at once.

Mr. Dunlop also alluded to the work done in certain districts of the Province, and showed that, if a similar amount were done in the other districts of the Province there would be no arrears.

He also stated that he was personally opposed to the appointment of district judges; and that, in his opinion, if the ten judges in Montreal had to attend to the Superior Court in Montreal, and also had to go on Circuit in the different districts, and attend to the additional duties imposed upon them by the Bill, matters would not be improved.

Mr. Dunlop also strongly placed before the Attorney-General the advisability of increasing the salaries of the judges resident in Montreal; and could see no reason why their salaries should not be increased, while those of judges living in less expensive places in the Province should remain as they are.

He also said he thought it would be better, before re-organizing the Courts, to wait for the completion of the Code of Procedure, as he had been informed by the Attorney-General that it would be completed down to, and including executions, in time

to be submitted to the Legislature at its next Session, which would commence on the 9th November, 1893, and that the Code, as a whole, would be submitted to the legislature for approval in the Session to be held in 1894.

Remarques de M. Lamothe, C.R. :—(Résumé.)

“ Le bill a pour but de remédier aux défauts du système judiciaire actuel. Ces défauts ont produit dans Montréal un état de choses déplorable.

“ Voici, en gros chiffres, où nous en sommes à Montréal avec le système actuel :

“ Nous avons plus de trois cents causes à la Cour Supérieure qui attendent leur tour pour être entendues. A la Cour de Circuit, il y a six cents ou sept cents causes qui sont dans le même cas. Le rôle de la Cour de Révision est considérablement chargé. Quant à la Cour d'Appel, il faut attendre deux ans environ avant de parvenir à l'audition d'une cause. C'est intolérable. Le barreau s'en plaint, le public s'en plaint et la presse qui est l'écho du public ne cesse de murmurer à ce sujet.

“ Nous n'avons pas assez de juges. A la cour supérieure le nombre des juges est de dix. Actuellement nous n'en avons que neuf et l'un des neuf est chargé du district de Terrebonne. Il est moralement impossible que neuf juges puissent satisfaire à la besogne judiciaire de la Cour Supérieure à Montréal. De temps à autres, nous avons une aide précieuse de la part des juges des districts ruraux. Mais depuis quelques années, ces juges sont de plus en plus retenus dans leur districts, soit par la multiplication des termes, soit par les affaires urgentes et sommaires.

“ Il est impossible de laisser les choses dans l'état actuel. L'accumulation des causes augmente constamment. Il faut un remède ; je ne dis pas qu'il n'y en a qu'un, mais il en faut un.”

Plus tard, répondant à l'observation que nos juges s'occupent d'affaires extérieures et ne donnent pas tout leur temps à la besogne judiciaire, M. Lamothe a dit à peu près ce qui suit :

“ L'on se plaint que les juges de Montréal ne se donnent pas exclusivement à leur besogne judiciaire, qu'ils donnent des cours de droit, qu'ils administrent des successions, etc., et on dit que c'est là la cause du mal.

“ Je ne puis, pour ma part, attribuer à cette cause l'accumulation des affaires judiciaires à Montréal. Je n'ai pas encore remarqué

que les juges étaient empêchés de siéger par suite des cours qu'ils donnent à l'Université. On peut même dire qu'il y a parmi ces professeurs, des juges que l'on trouve sur le banc aussi fréquemment que leurs collègues et qui sont toujours prêts à se rendre aux désirs du barreau quand on a besoin d'eux. On ne peut exiger, d'ailleurs, que nos juges soient constamment sur le banc. Ils sont sujets aux maladies comme les autres mortels. Il survient dans leurs familles des événements qui les retiennent au foyer, tout comme dans les familles des autres citoyens. Enfin, il faut aussi leur laisser le temps de délibérer.

" Dans mon opinion, empêcher les juges de donner des cours de droit dans les universités, de publier des ouvrages de droit et d'administrer des successions ne serait qu'apporter un bien faible palliatif aux maux dont nous souffrons. Le remède n'est pas là. Vu le nombre d'affaires considérable et de tous genres qu'il a y à juger à Montréal, le nombre des juges y est devenu insuffisant."

Enfin, dans le cours des remarques échangées entre les divers délégués du barreau, M. Lamothe a plusieurs fois affirmé son opinion que le bill projeté de l'Honorable M. Casgrain était de nature à remédier à notre état de choses actuel à Montréal, vu qu'il va nous donner immédiatement seize juges résidant à Montréal au lieu de dix—sans compter les juges de la Cour d'Appel qui restent les mêmes.

OBSERVATIONS DE M. GLOBENSKY, C. R.

Le soussigné, ayant eu l'honneur d'être délégué par le barreau de Montréal, auprès de l'Honorable Procureur-Général de cette Province, au sujet du bill de réorganisation des cours, lui a exposé les raisons qui l'ont porté à se prononcer contre le projet de loi dont il s'agit. Ces raisons sont les suivantes :

1o. Parce que le système de judicature qui régit aujourd'hui la Province de Québec fonctionne depuis près de quarante ans avec efficacité et à la satisfaction générale.

2o. Parce qu'aucune plainte de la part des justiciables des districts ruraux que le projet de réorganisation doit particulièrement affecter n'a été faite contre le système actuel.

3o. Parce que les plaintes concernant l'administration de la justice ne dépendent pas du système de judicature auquel la Province est soumise, mais tiennent à des causes d'un ordre tout différent dont quelques-unes sont les nominations aux fonctions judiciaires dans lesquelles les considérations politiques entrent plus que la compétence des titulaires.

40. Parce que la mauvaise administration de la justice dont souffrent quelques districts de cette Province, dépend surtout du mauvais système de procédure qui nous régit et d'une application de ce système plus vicieuse encore.

50. Parce que les justiciables de nos tribunaux et ceux qui sont intimement liés à l'administration de la justice dans les districts ruraux, les avocats entr'autres, loin de se plaindre du système actuel le considèrent au contraire très avantageux pour les plaideurs, et au lieu de vouloir le faire disparaître désirent plutôt le conserver tel qu'il est.

60. Parce que le système de judicature que l'on veut introduire en opérant la centralisation des juges touche à décentralisation judiciaire comme la forme de la justice touche au fond de la justice même. Or la décentralisation n'est qu'une forme, une manière, un moyen d'administrer la justice.

En d'autres termes, parce que la décentralisation des juges est si intimement liée à la décentralisation de la justice, que toucher à l'une c'est toucher à l'autre.

70. Parce que le salaire attaché à la position de juge de district et la clause du projet de loi qui permet d'y appeler des avocats de cinq ans de pratique, loin d'offrir une garantie d'administration convenable de la justice font craindre des inconvénients et un état de choses pire encore que ceux dont on se plaint aujourd'hui.

80. Parce que d'après les calculs de l'honorable procureur-général tel qu'on les trouve exposés dans son discours sur le projet de loi en question, les quatre cinquièmes des causes de cette province sont d'une somme de \$400.00 et au-dessous. Or il ne serait ni juste ni raisonnable d'offrir à ces juges de district pour faire les quatre cinquièmes de tout l'ouvrage des cours civiles de cette province, et de plus une grande partie de la besogne criminelle, un salaire de deux mille ou deux mille quatre cents par année, tandis que les autres juges recevaient pour un cinquième seulement de l'ouvrage un salaire de cinq ou six mille piastres.

90. Parce que avec ce système de judicature les quinze juges de la cour supérieure seront souvent disséminés dans les vingt comtés où ils devront administrer la justice, et que de cette manière ils seront forcés d'employer une grande partie de leur temps à voyager, en sorte que, les grands centres comme Montréal, Québec et Sherbrooke où la plus grande somme des affaires judi-

iaires de cette province sont jugées, seront souvent sans juge au grand détriment des intéressés.

10o. Parce qu'il faut bien considérer que d'après le système que l'on veut introduire, les juges seront appelés aujourd'hui dans un district pour entendre une requête et le lendemain dans le même ou dans un autre pour entendre une simple motion. Peut-être y seront-ils retenus plusieurs jours consécutifs pour entendre les parties sur un simple incident; pendant ce temps les plaideurs des autres districts attendraient le retour des juges pour obtenir justice. Quels inconvénients ne résulterait-il pas pour les districts ruraux, de l'application des articles 801 et 835 du code de procédure concernant le *capias* et la saisie-arrest, et des articles 819 et 854 du même code se rapportant à la contestation de ces brefs.

11o. Parce que dans la pensée du grand homme d'Etat canadien dont le pays regrette encore la perte, Sir George Etienne Cartier, le principal auteur du système actuel, la décentralisation judiciaire dont a été dotée notre province ne devait pas seulement comprendre les tribunaux, mais les juges mêmes, et cela non seulement afin de permettre à la justice d'être constamment au milieu des plaideurs, mais encore afin de donner aux villes des divers districts de cette province, le relief et le prestige que ne manque pas de donner la résidence des juges d'une cour de l'importance de celle de la cour supérieure.

12o. Parce que par le nouveau système de judicature on touche non seulement à la décentralisation judiciaire, mais encore au système du jury en matières civiles auquel beaucoup d'esprits sérieux sont encore profondément attachés.

Il est vrai qu'on ne l'abolit pas, mais on le restreint de manière à ne l'appliquer que dans les causes au-dessus de quatre cents piastres, tandis qu'à présent il existe dans les causes de deux cents piastres, dans certains cas définis par la loi.

13o. Parce que si le nouveau projet de loi était adopté, l'engorgement des causes devant la Cour de Révision qui offre une prime à la mauvaise foi des plaideurs et entrave le cours de la Justice serait considérablement augmenté par les nombreux appels que ne manquerait pas d'inspirer soit le désir d'obtenir du délai, soit le manque de confiance dans le jugement des juges que l'on considèrera à tort ou à raison, comme des juges inférieurs.

14o. Parce que s'il faut porter remède à l'état de choses actuel, il y en a un qui s'offre à l'attention des législateurs.

Ou bien le système actuel est mauvais ou bien il est bon. S'il est mauvais, il doit être facile de le prouver, ce que l'on n'a pas fait jusqu'à présent. S'il est bon, et en l'absence de preuve au contraire, il faut le croire bon, non seulement on aurait tort, mais il serait dangereux de le changer.

Si donc le système actuel est bon, le malaise que l'on éprouve et dont les intéressés se plaignent doit être le résultat d'une cause qui lui est étrangère, soit le nombre trop restreint des juges, soit la mauvaise distribution de l'ouvrage entre eux, soit le système de procédure.

Si le nombre des juges est trop limité, rien n'est plus facile que de l'augmenter. Dans ce cas on pourrait nommer cinq nouveaux juges de la cour supérieure, ce qui en porterait le nombre à trente-cinq. De ces trente-cinq juges, trois pourraient être titulaires d'un tribunal de Révision. Et si tant est qu'un tribunal de Révision doive exister, un tribunal indépendant peut seul être acceptable.

Ce tribunal pourrait créer alors une jurisprudence de nature à éclairer les plaideurs sur leurs droits, sur leur chance de succès quand ils songeront à demander la révision de jugements rendus contre eux.

D'un autre côté avec cinq juges de plus, l'idée de l'honorable juge T. J. J. Loranger et de l'honorable juge Pagnuelo de faire décider les causes par trois juges, en première instance, idée que j'ai l'honneur de partager avec ces magistrats savants et distingués, pourrait être mise à exécution, ce qui ferait disparaître en outre un degré de juridiction.

Il resterait encore deux juges qui pourraient tenir la cour de Circuit.

Le système de l'audition et de la décision des causes contestées par trois juges serait d'une application facile.

Il suffit pour s'en convaincre de lire les études de MM. les juges T. J. J. Loranger et Pagnuelo sur la réorganisation judiciaire.

D'après ce système les districts pourraient être subdivisés et groupés de manière à ce que la justice y soit administrée par trois juges.

Il y aurait deux chambres. Dans la première, présidée par les trois juges réunis, seraient entendues et décidées les causes contestées. Dans la deuxième, présidée dans chacun de ces districts

par le juge résident, seraient entendues les causes par défaut et seraient vidés tous les incidents de procédure.

Les termes pour l'audition et la décision des causes contestées seraient tenus à certaines époques, dans chacun des districts, par rotation.

Quant à Montréal et à Québec, les juges qui y résident aujourd'hui continueraient d'y remplir leurs fonctions comme par le passé, sauf le changement que je viens d'indiquer.

A Montréal, par exemple, où nous avons dix juges, deux divisions de la première chambre, composées de trois juges chacune, pourraient siéger dans la première chambre une vingtaine de jours par mois, occupant ainsi six juges.

Les quatre autres juges tiendraient la deuxième chambre et remplaceraient ceux de leurs collègues qui, pour une cause ou pour une autre, seraient dans l'impossibilité de siéger.

En supposant que les deux divisions de la première chambre n'entendraient que six causes par jour, elles n'auraient qu'à siéger deux cents jours par année pour décider douze cents causes, ce qui est plus que le chiffre des causes contestées dans ce district.

Comme il a déjà été dit, les quatre autres juges videraient tous les incidents qui naîtraient de ces causes contestées.

La Cour de Circuit serait tenue par les deux juges dont la nomination est si impatiemment, ou plutôt si patiemment attendue par le barreau et les plaideurs.

Avec ce système, la cour d'enquête n'aurait plus sa raison d'être, ce qui serait un embarras de moins dans le chemin de la justice.

La cour de révision—un autre embarras dans le chemin de la justice—cesserait d'exister. Le manque d'uniformité dans les décisions et l'isolement des juges—deux choses qui ont contribué à la naissance du nouveau projet—disparaîtraient. La question des dépenses—si tant est qu'il faille parler de sous dans une matière qui intéresse l'ordre social tout entier—la question des dépenses resterait la même, quant à la province, que sous le régime actuel. Plus de longs délibérés. Ce serait l'âge d'or de la justice prompt et sommaire. Sans compter qu'aucun de ceux qui administrent la justice aujourd'hui ne serait privé de ses fonctions.

Je crois même qu'avec ce système 32 juges suffiraient.

De plus, l'appel ne devant être permis que dans les causes de cinq cents piastres et plus, la cour d'appel serait déchargé d'un

fardeau qu'elle porte allègrement du reste, mais qui ne laisse pas que de rendre plus lente la marche de la justice.

Mais peut-on dire que les juges ne sont pas assez nombreux pour disposer de la besogne judiciaire ?

Pour répondre à cette question il faut recourir aux statistiques judiciaires. Prenons par exemple le nombre des causes jugées en 1891.

En 1891, il y a eu devant la cour supérieure et la cour de circuit, dans toute la province de Québec, 9,294 causes jugées réparties comme suit :

4,792 devant la cour de circuit et 4,502 devant la cour supérieure. Si les causes avaient été équitablement distribuées entre les trente juges de cette province, chaque juge en aurait jugé 309, soit 150 à la cour supérieure et 159 à la cour de circuit.

Est-ce beaucoup, est-ce trop ? Mais étant admis que la besogne n'est pas équitablement distribuée et que certains juges n'ont que peu de causes à juger, on conçoit que plusieurs de nos juges ont beaucoup plus que trois cents causes à décider. Ainsi, par exemple, dans le district de Saint François, l'honorable juge Brooks qui y réside et qui exerce la magistrature avec une si grande distinction, a jugé, en 1891, 298 causes devant la cour de circuit et 231 causes devant la cour supérieure, soit en tout 529 causes sans compter les jugements qu'il a dû rendre sur les incidents qui se sont produits dans ces diverses causes, incidents dont il faut aussi tenir compte dans le calcul des causes des autres districts. De plus M. le juge Brooks a présidé les assises où de nombreux et importants procès se sont déroulés.

En considérant le nombre des causes jugées dans le district de St. François, on arrive à la conclusion que 15870 causes pourraient être jugées annuellement par nos trente juges en cette Province, et que dans le district de Montréal avec nos dix juges 5290 causes pourraient être décidées annuellement, soit 2980 devant la cour de circuit et 2310 devant la cour supérieure.

Or, d'après les statistiques il y a eu que 1074 causes contestées à Montréal en 1891 devant la cour supérieure, à cela il faut ajouter naturellement les brefs de certiorari, mandamus, quo warranto, de prohibition, les oppositions afin d'annuler, afin de détruire, afin de charger, afin de conserver, et les causes en révision dont 211 ont été jugées.

En supposant que ces dernières procédures aient donné le chiffre de 500 contestations, il y aurait encore une marge considérable.

Si le mal dont on souffre est le résultat de la mauvaise répartition entre les juges, des causes à juger, il semble que l'on pourrait trouver un remède à cela sans toucher à la décentralisation judiciaire.

Enfin, si la faute de tout ce dont on se plaint concernant l'administration de la justice est dans le code de procédure, le remède est trop facile à appliquer pour qu'il soit besoin de faire autre chose que le mentionner; amendons le code. Mais ne touchons pas à un système qui a été le fruit de beaucoup de réflexion, d'une longue expérience et qui a contribué peut-être plus qu'on ne le croit à donner aux populations rurales l'importance qu'elles ont acquise depuis qu'elles vivent sous le système de judicature qui les régit actuellement.

De plus le projet de loi en question est de nature à étouffer pendant quinze ou vingt ans les légitimes aspirations d'avocats que leurs talents destinent à revêtir l'hermine des juges de la cour supérieure, étant donné que toute vacance créée dans un district rural serait remplie par un juge de district et que toute vacance créée dans les districts de Montréal et de Québec serait remplie par un juge des districts ruraux. Cette raison qui a peut-être moins d'importance que les autres, mérite néanmoins d'être mentionnée.

De tout ce qui vient d'être dit il ne faudrait pas conclure que le projet de loi en question est sans mérite. Au contraire ceux qui veulent un changement radical, une organisation judiciaire nouvelle peuvent avec raison le trouver des plus acceptables. Toutefois ce ne peut être qu'à la condition de renverser l'ordre de choses établi ou pour le moins d'entrer dans une voie qui y conduit. Mais il n'en peut être ainsi pour ceux qui croient que le système actuel a déjà produit et peut, bien appliqué, produire encore les meilleurs résultats. Tel qu'il est le projet de loi de l'honorable procureur général révèle chez son auteur un esprit sérieux et capable d'entreprendre de grandes choses dans l'intérêt de la justice. En cela le barreau de cette province doit à l'honorable Monsieur Casgrain de reconnaître publiquement ses mérites et de ne pas lui ménager l'expression de sa haute appréciation des efforts qu'il fait pour raffermir la confiance des justiciables dans les tribunaux de cette province.

On ne saurait lire ce projet de loi sans constater que l'honorable procureur général sentait qu'il côtoyait en le faisant, l'abîme de la centralisation judiciaire. Il semble n'y pas tomber en voulant créer des juges de district qui y résideraient permanemment,

mais il y tombe réellement en voulant enlever aux districts ruraux les juges de la cour supérieure qui y résident.

Il y aurait bien en vertu du projet de loi, décentralisation de la justice, mais elle n'existerait réellement que dans les causes de quatre cents piastres et au-dessous.

Dans les causes d'un chiffre plus élevé il y aurait centralisation, car il ne faut pas oublier que le mot justice dans la phrase "décentralisation de la justice" ne veut pas dire seulement cette vertu morale qui consiste à rendre à chacun ce qui lui est dû. Il veut dire dans ce cas la personne qui rend la justice autant que la justice, le tribunal même.

Or si vous centralisez les juges, vous centralisez la justice dans les causes de plus de quatre cents piastres.

Les justiciables dans les causes de plus de quatre cents piastres verraient-ils alors la justice venir les trouver à leur porte, suivant l'expression de l'honorable procureur général ? Oui peut-être, mais après avoir longtemps attendu que les juges se soient éloignés du centre d'où ils devront nécessairement partir pour se rendre jusqu'à eux.

La justice tardive est souvent pire que l'injustice, par les complications nombreuses qu'elle entraîne presque toujours.

Différer la justice, c'est violer un des premiers principes de la Grande Charte—pierre angulaire de tout l'ordre juridique—*nulli vendemus, aut negabimus, aut differemus rectum vel justitiam*.

Différer la justice c'est, dans la plupart des cas, rendre illusoire le recours qu'elle offrait.

Une étude consciencieuse du projet de loi en question m'ayant déterminé à me prononcer contre son adoption, j'ai cru par respect pour l'homme distingué qui est à la tête du département de l'administration de la justice de cette province, et pour ceux qui ne partagent pas ma manière de penser, devoir mettre par écrit les raisons qui m'ont porté à conclure comme je le fais.

Réformons ce qui doit être réformé, mais ne détruisons pas notre système de judicature.

"La décentralisation judiciaire, écrivait feu l'honorable juge Loranger, est aujourd'hui un fait accompli, et ce serait se perdre dans de vaines utopies que de chercher des combinaisons "pour rétablir l'ancien système ou renverser le nouveau."

Je regrette de différer, au sujet de ce projet de loi, d'avec plusieurs de mes confrères du barreau de cette province dont j'admire

le talent et pour l'opinion desquels j'ai le plus grand respect. Mais mes regrets sont tempérés par l'espérance qu'ils voudront bien croire à ma sincérité, comme je crois à la leur, et qu'ils ne m'attribueront pas d'autre mobile que l'intérêt des justiciables et et du barreau, et un ardent désir de voir la justice mieux administrée.

WOLMERHAUSEN v. GULLICK.

The decision of Mr. Justice Wright in *Wolmerhausen v. Gullick* (Chancery Division), reported in the *Times* of May 2, raises a novel and important point in the law of suretyship. The question was whether a co-surety on a promissory note can sustain an action for contribution against another co-surety before he has actually paid more than his own proportion of the joint liability—the principal creditor not being a party to the suit.

It is an agreeable proof of the infinite variety of circumstances in legal cases, that no exact counterpart of this case is to be found. There are two ways of securing justice in contributions. One is that adopted by the Roman law, that of compelling the creditor to limit his claim against each surety to a proportional share. This method was followed by the ancient custom of the city of London. The other is to refrain from restraining his creditor, but to give the surety who is compelled to pay more than his share a remedy over against his co-surety. This is the method adopted in English law.

Common Law courts always insisted that a surety must have paid already more than his share before he could institute an action for contribution, which they regarded as an action for money paid. This is settled law since 1840 (*Davies v. Humphreys*, 6 M. & W. 123). Chancery took a different view, but in only two cases were decrees actually made ordering the co-surety to pay direct to the creditor, the creditor being made a party to the suit (*Dering v. Lord Winchelsea*, W. & T. L. C.; *Morgan v. Seymour*, 1 Law J. Rep. Chanc. 120). Curiously enough, the custom of the city of London, like Chancery, did not require excessive payment as a basis for action.

In *Ex parte Snowden*, 17 L. R. Chanc. Div. 41 (1881), the Court of Appeal annulled an adjudication in bankruptcy obtained by one surety against another, on the ground that no debt was due, as the first had not paid more than his share, and also that his proper remedy was to call for contribution.

Mr. Justice Wright decided incidentally that the Statute of Limitations did not run against the first surety until his liability was ascertained; and decreed that, upon the plaintiff paying his own share, the defendant, by payment to the principal creditor or otherwise, should exonerate the plaintiff from further liability. *Law Journal (London)*.

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CURRENT TOPICS AND CASES.

A case occurred very recently in Ontario where a burglar was shot in the act of plundering. It may be well for burglars as well as householders to know that there is good authority for such treatment of midnight depredators. Before the Manchester Assizes, a few weeks ago, one Higgins was tried for shooting a burglar. The facts were as follows: An innkeeper was charged with having at Manchester, on September 5, feloniously shot at Owen Riley with intent to do him some grievous bodily harm. At 2.10 a.m. on the day in question a police-constable, hearing a whistle, went to the Victoria Hotel, kept by the prisoner, whom he found standing on the steps. He said he had shot Riley, whom he had found in his house. On being charged, he stated that at 1.50 a.m. he was awakened by his wife, and, after listening for a time, heard a noise downstairs. He took his revolver, went downstairs, called 'Who is there?' and getting no answer opened the door. Riley was crouching down, the room being nearly dark. Being frightened, and not knowing how many burglars might be in the house, he fired and hit Riley in the chest. In a subsequent statement he said that he had only intended to frighten the man he saw, and was very sorry for what

had happened. Owen Riley was called as a witness, having previously pleaded 'Guilty' to the charge of burglary. He said that the defendant had shot him from inside the kitchen door, and that there was a light in the room. Counsel for the defence submitted that even on the assumption that Higgins had shot Riley intentionally he could not be convicted, as he was acting reasonably in defence of his life and property when a felony had been committed. Mr. Justice Grantham ruled that there was no evidence against the prisoner of shooting with a felonious intention. He said that the prosecutor, having, by his own account, broken into the house and searched it for what he could steal, the prisoner, coming into the room as he did, was entitled to shoot at him. He therefore directed the jury to acquit the prisoner, who was thereupon discharged.

We notice a statement that the Georgia House of Delegates has voted down a proposition to increase the salary of the judges of the Superior Court from \$2,000 to \$2,500. The motive for this misplaced economy does not appear. It can have no connection, we presume, with the fact that lynch law has so largely replaced the ordinary methods of justice in the Southern States.

A peculiar question of the law of assault is before the Supreme Court of Massachusetts. The defendant is a milkman who had been accustomed to leave milk at an early hour at the plaintiff's house. At intervals he had entered the plaintiff's sleeping-room for the purpose of collecting his bill while his debtor was in bed. The evidence does not show that the plaintiff was reluctant to settle the claims against him. The method of collection was merely a usage to which he submitted. But after a while he grew tired of it, and notified the milkman to discontinue the practice. One morning, however, the defendant, wanting his money and not finding the

plaintiff up, made his way again to the room, and aroused plaintiff by shaking his shoulder. Then the defendant presented his bill. It happened that the customer had just fallen asleep after a night of sickness, and he showed his resentment by bringing suit for assault against his creditor. The lower Court entered judgment for the defendant, but the plaintiff is not satisfied, and wishes it to be settled once for all whether a milkman can awaken a customer and demand his dues at an unseemly hour.

A propos of lotteries and bazaars, Mr. Justice Monroe recently told a good story illustrative of the gambling spirit of the age. His lordship visited a bazaar. A little girl—ten or twelve years of age—asked him to buy a ticket. He said to her, 'Do you know, my dear girl, were I to buy and you to sell a ticket we should bring ourselves within measurable distance of the law, and if we were brought before the magistrates we might be treated as rogues and vagabonds.' The little girl looked at the great lawyer for a moment, surveying him from the crown of his head to the sole of his foot, taking his measure, as he thought, and then, with sublime audacity, said: "Well, sir, shall I say one ticket or two?" The result of the appeal was not disclosed by the narrator of the incident.

THE LATE MR. JUSTICE TASCHEREAU.

The late Hon. Jean T. Taschereau, ex-judge of the Supreme Court of Canada, who died at Quebec, November 9, aged 78, was a son of the late Jean T. Taschereau, Sr., in his lifetime one of the puisne judges of the Court of Queen's Bench of Lower Canada. His mother was Marie Panet, daughter of Hon. Jean Panet, first speaker of the House of Assembly for the province of Quebec, an office which he held for twenty consecutive years. The deceased was born in the city of Quebec, on December 12, 1814. He was educated at the Quebec Seminary, where he greatly distinguished himself in different branches, taking prizes

in mathematics, Latin, etc. He studied law in his native city with Messrs. Stuart and Black; was called to the bar of Lower Canada in 1836, and subsequently followed several law courses in Paris, France. He practised his profession with great success for more than twenty years. He was created a Q. C. in 1860, and received the title of LL.D. from Laval University in 1855. On September 3, of the last mentioned year, he was appointed an assistant judge of the Superior Court of Lower Canada, to replace a judge of the Superior Court at Quebec during the sittings of the Special Court appointed under the act for the abolition of feudal rights in Lower Canada. On June 8, 1860, he was appointed an assistant judge of the Superior Court of Lower Canada, to replace the Hon. Justice Morin, who was appointed on the commission for codifying the laws. On August 11, 1865, he was appointed a puisne judge of the Superior Court of Lower Canada as successor to the Hon. A. N. Morin, deceased. On February 11, 1873, he was appointed a puisne judge of the Court of Queen's Bench, Lower Canada, and on October 8, 1875, was appointed a puisne judge of the Supreme Court of the Dominion. The latter office he resigned on account of ill-health, on October 19, 1878, after being on the bench for nineteen years.

EXCHEQUER COURT OF CANADA.

OTTAWA, November 6, 1893.

Coram BURBIDGE, J.

THE QUEBEC SKATING CLUB, suppliants, and THE QUEEN,
respondent.

Contract—Breach of—Promise to promote legislation by Minister of the Crown—Effect of—Ordinance land—Control and disposition of.

Held:—1. No Minister or Officer of the Crown can bind it without the authority of law.

2. An order of the Governor-General in Council pledging the government to promote legislation does not constitute a contract for the breach of which the Crown would be liable in damages.

3. The Minister of the Interior cannot lease or authorize the use of ordnance lands without the authority of the Governor in

Council. R. S. C., c. 22, sec. 4; R. S. C., c. 55, secs. 4 & 5, discussed. *Wood v. The Queen*, 7 Can. S. C. R. 631; *St. John Water Commissioners v. The Queen*, 19 Can. S. C. R. 125, and *Hall v. The Queen*, 3 Ex. C. R. 373, referred to.

G. C. Stuart, Q.C., for suppliants.

W. D. Hogg, Q.C., for respondent.

June 26, 1893.

Coram BURBIDGE, J.

CARTER et al. v. HAMILTON.

Patent — "*The Paragon Black-leaf Cheque Book*" — *Validity* —
Want of novelty—*Infringement*.

The plaintiffs obtained letters-patent on the 15th February, 1882 (registered in the patent office at Ottawa as No. 14182), for "The Paragon Black-leaf Cheque book composed of double leaves, one-half of which is bound together while the other half folds in as fly leaves, both being perforated across so that they can readily be torn out; the combination of the black-leaf bound into the book next to the cover, and provided with the tape bound across its end, the said black-leaf having the transferring composition on one of its sides only." The objects of the invention, as stated in the specification, were to provide a check-book in which the black-leaf used for transferring writing from one page to another need not be handled and would not have a tendency to curl up after a number of leaves have been torn out. The first of such objects was to be obtained by the use of the tape which enabled "the black-leaf to be folded back or raised without soiling the fingers," and the second by binding the black-leaf in with the other leaves but next to the cover, in which position there "would be less likelihood of the black-leaf becoming crumpled up than if it were placed in the centre and the leaves removed from the stub on either side."

The defendants had a patent for and manufactured a counter-check-book in which a margin was left on the carbon leaf by which it could be turned over without soiling the fingers. With the exception of the tape for turning the leaf it was established that the plaintiffs' patent had been anticipated, and it was also proved that prior to the issue of the plaintiffs' patent, a patent had been granted in the United States for the process of manu-

facturing carbon for use in manifold writing with clean margins so that the paper could be handled without soiling the fingers.

Held:—That if the plaintiffs' patent was constructed to include the use of clean margins on carbon paper, as applied to counter-check-books, it failed for want of novelty; but that if the patent was limited, as it was thought it should be, to the means described therein for turning over such carbon leaves without soiling the fingers, that is, to the use of the tape, the defendants did not infringe the patent by using a clean margin for the like purpose.

W. Cassels, Q.C., and Edgar for plaintiffs.

Johnston for defendants.

NOVA SCOTIA ADMIRALTY DISTRICT.

March 16, 1893.

MACDONALD (C. J.), L. J. A.

THE SANTANDERINO.

Collision—Arts. 18 and 21 of the Navigation Act, R. S. C., c. 79, sec. 2—Undue rate of speed for steamer in public roadstead—Negligence in taking precautions to avert collision—Responsibility for collision where such occurs.

The steamship S. was proceeding up the harbour of Sydney, C. B., at a rate of speed of about 8 or 9 miles an hour. When entering a channel of the harbour which was about a mile in width, her steam steering-gear became disabled and she collided with the J., a sailing vessel lying at anchor in the roadstead, damaging the latter seriously. It was shown that the master of the S. had not acted as promptly as he might have done in taking steps to avoid the collision when it appeared likely to happen.

Held,—that even if the breaking of the steering-gear—the proximate cause of the collision—was an inevitable accident, the rate of speed at which the S. was being propelled while passing a vessel at anchor in a roadstead such as this, was excessive, and, in view of this and the further fact that the master of the S. was not prompt in taking measures to avert a collision when he became aware of the accident to his steering-gear, the S. was in fault and liable under Article 18 of sec. 2 of R. S. C., c. 79.

Held,—also, that the provisions of Article 21 of sec. 2, R. S. C., c. 79, should be applied to roadsteads of this character, and that

inasmuch as the S. did not keep to that side of the fairway or mid-channel which lay on her starboard side, she was also at fault under this article, and responsible for the collision which occurred.

W. B. A. Ritchie for plaintiffs.

A. Drysdale for defendants.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

April 28, 1893.

SIR MATTHEW B. BEGBIE, C. J. (L. J. A.)

THE SHIP "CUTCH."

Maritime law—Collision—Responsibility for, where uninjured ship declines to assist helpless one—The Navigation Act, R. S. C., c. 79, secs. 3 and 10.

Under the provisions of section 10 of the Navigation Act [R. S. C., c. 79] where a collision occurs, the ship neglecting to assist is to be deemed to blame for the collision in the absence of a reasonable excuse.

Two steamships, the C. and the J. were leaving port together in broad daylight, and a collision occurred between them. The J. received such injury as to be rendered helpless. The C. did not assist, or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of the C. was that the J. did not whistle for assistance, although the evidence showed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shown that these ships were at anchor and idle.

Held,—that the circumstances disclosed no reasonable excuse for failure to assist on the part of the C. and that the consequences of the collision were due to her default.

Held,—also, that the C. was in fault under Art. 16 of sec. 2 of the Navigation Act for not keeping out of the way of the J., the latter being on the starboard side of the C. while they were crossing.

Pooley, Q.C., for plaintiffs.

E. V. Bodwell and P. Æ. Irving for defendant.

October 2, 1893.

Coram BURBIDGE, J.

HALL v. THE QUEEN.

*Parol contract between Crown and subject—R. S. C., c. 37, s. 23—
Effect of its provisions where contract executed—Quantum
meruit.*

Held,—The provisions of the 23rd section of R. S. C., c. 37, do not apply to the case of an executed contract; and where the Crown has received the benefit of work and labour done for it or of goods or materials supplied to it or services rendered to it, by the subject, at the instance and request of its officer, acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same.

A. P. Pousette, Q.C., for plaintiff.

W. D. Hogg, Q.C., for defendant.

LE BILL DE JUDICATURE.

Un représentant de *l'Événement* a eu avec M. Casgrain l'entrevue suivante au sujet du bill de judicature :

Q.—M. Casgrain, avez-vous lu l'article de M. A. Globensky, de Montréal, au sujet de votre bill sur la réorganisation des tribunaux ?

R.—Oui ; et comme M. Globensky paraît avoir fait une étude profonde de la question, son article m'a fort intéressé, comme je l'avais été du reste par le rapport par lui fait au barreau de Montréal.

Q.—Pouvez-vous donner une réponse aux derniers arguments de M. Globensky ?

R.—Naturellement je ne puis, dès maintenant, vous faire l'exposition complète de la question ni donner toutes les raisons qui militent en faveur de mon projet. Lorsque je présenterai la mesure à la Chambre je les donnerai plus au long.

Q.—La principale objection de M. Globensky paraît être basée sur le fait que votre projet de loi tend à détruire le système de décentralisation judiciaire établi en 1858 par sir George Cartier ?

R.—C'est là le principal cheval de bataille de tous ceux qui, pour une raison ou pour une autre, sont opposés à la mesure, mais je déclare que personne ne peut lire le projet de loi sans être con-

vaincu qu'il ne touche aucunement au principe de la décentralisation judiciaire ; je vais plus loin, je dis que la décentralisation qui se fera en vertu de mon bill sera plus grande que celle qui existe maintenant. La décentralisation judiciaire ne dépend pas de la résidence des juges de la cour supérieure dans chaque district, mais elle dépend de l'audition des causes, de la reddition des jugements, enfin, de l'administration de la justice dans chaque district. Avant 1857, la cour supérieure ne siégeait que dans sept districts : à Montréal, Québec, Sherbrooke, Trois-Rivières, Ottawa, Kamouraska et Gaspé. En 1857, la loi de sir Georges Cartier créa dix-huit juges de la cour supérieure, qui devaient exercer leurs fonctions dans les différents districts qui furent alors créés. Depuis ce temps, l'on a augmenté le nombre des districts, ainsi que le nombre des juges de la cour supérieure, donnant à chaque district un juge de la cour supérieure qui y administre la justice. Je ferai remarquer, dès maintenant, que la loi qui oblige les juges à résider dans les limites de leur district est presque une lettre morte. Aujourd'hui il n'y a pas de juges résidant dans les districts de Saguenay, Rimouski, Joliette, Beauce, Richelieu et Pontiac. Mon projet de loi ne change aucunement les limites des districts qui existent actuellement. Les causes qui y prennent naissance et qui y sont jugées maintenant, le seront encore. Pas une cause, pas une motion, même la moins importante, qui y est plaidée et jugée maintenant, sera plaidée ou jugée ailleurs. La seule différence, c'est qu'au lieu d'avoir un seul tribunal pour toutes les causes, il y en aura deux, divisés d'après le montant en litige.

Pour les causes de moins de \$400, il y aura un tribunal qui s'appellera la cour de district, présidé par un juge de district, résidant au chef-lieu de chaque district ; pour les causes au-dessus de \$400, il y aura la cour supérieure composée de quinze juges ; il est vrai que la résidence de ces derniers juges sera fixée à Montréal et à Québec, mais ils iront à tour de rôle, dans chaque district pour y entendre et juger les causes au-dessus de \$400. Ainsi, comme vous le voyez, je ne touche en rien au principe de la décentralisation tel qu'établi par sir George Cartier, et je le pousse même plus loin, car je donnerai des juges de district à des endroits comme la grande région au nord de Montréal, au nord de Québec et à d'autres endroits qui n'ont pas encore cet avantage.

Q.—Quel est l'avantage de diviser ainsi la cour supérieure en deux, donnant une juridiction à certains juges dans les causes jus-

qu'à \$400, et à d'autres juridiction dans des causes au-dessus de cette somme ?

R.— Les trois-cinquièmes, à peu près, des causes sont pour un montant au-dessous de \$400. Toutes les causes, aujourd'hui, dans lesquelles le montant en litige dépasse \$100 peuvent être portées en appel à la cour du Banc de la Reine; la conséquence, c'est qu'aujourd'hui, le rôle de la Cour d'Appel est tellement chargé que, si vous inscrivez une cause en appel, vous êtes obligé d'attendre deux ans avant de pouvoir la plaider. Je propose d'améliorer ce système. Les jugements de la cour de district pourront être portés en appel devant la cour de Révision, laquelle sera composée, comme elle l'est maintenant, des juges de la cour supérieure. Ce tribunal sera donc un tribunal d'appel proprement dit, et on ne l'appellera plus, comme on l'appelle maintenant, un tribunal de *confirmation*. Pour les causes où le montant en litige excèdera \$400, appel sera porté devant la cour du Banc de la Reine — on atteindra ainsi un double but — on diminuera le nombre des appels à la cour du Banc de la Reine, on diminuera également les frais, on donnera aux juges de la cour supérieure et de la cour de district, tout le temps nécessaire pour entendre et étudier les causes qui leur sont soumises, et on débarrassera la cour du Banc de la Reine de l'énorme fardeau qui pèse actuellement sur elle, lui donnant ainsi une efficacité plus grande.

Q.—Quels sont à peu près les frais d'une cause portée en appel devant la Cour du Banc de la Reine ?

R.—Pour la moindre cause de \$100 quand il y a bien peu de preuve à imprimer, les frais sont de \$300.

Q.—Quels seront les frais d'un appel d'un jugement de la Cour de district devant la Cour de Révision ?

R.—Une centaine de piastres au plus.

Q.—Mais on objecte que pour les matières sommaires, les brefs de prérogatives, les décisions à l'enquête, etc., on sera obligé dans les districts ruraux, d'attendre dans les causes au-dessus de \$400 que le juge de la Cour Supérieure vienne pour le terme ?

R.—Ceci est une matière de procédure dont je n'ai pas parlé dans le projet de loi tel que soumis à la dernière session, mais pour qu'il n'y ait pas de malentendu, cette année, j'ai inclus une clause donnant, sur toutes ces matières, juridiction aux juges de districts, sauf appel, soit à la Cour de Révision, soit à la Cour du Banc de la Reine, soit aux deux successivement.

Q.—Vous dites que la loi, fixant la résidence des juges est une

lettre morte. Croyez-vous que les juges de district résideront dans leurs districts ?

R.—Oui. Aujourd'hui l'ouvrage est inégalement distribué entre les juges et ceux-ci, qui pour la plupart ont été choisis parmi les avocats des villes, trouvent toujours, dans le surcroît de l'ouvrage dans les villes, un prétexte d'y passer la plus grande partie de leur temps, et même d'y résider. Par mon bill l'ouvrage est plus également divisé, ce prétexte n'existe plus, les juges de district étant choisis plus particulièrement parmi les avocats de la campagne, n'auront aucun intérêt ni aucun prétexte de résider ailleurs qu'à la campagne, et je puis vous dire, en passant, qu'il y a, dans presque tous les districts ruraux, des avocats éminents qui figureront avec avantage à côté de nos juges.

Q.—Vous remarquez, M. le Procureur, que M. Globensky et ceux qui combattent votre projet de loi, disent que les avocats et les justiciables sont satisfaits du système actuel ?

R.—Oui, et je suis de plus en plus étonné chaque fois que j'entends faire cette assertion. Depuis que je suis au Barreau, j'entends des plaintes contre le système qui existe actuellement. Dès 1880, M. le juge Pagnuelo écrivait sur la réforme judiciaire des lettres restées célèbres, et dans lesquelles il disait que depuis dix ans déjà l'opinion demandait des changements radicaux. Vers le même temps, feu M. le juge Loranger écrivait dans le même sens. L'honorable M. Laflamme qui est une autorité sur la matière écrivait la même chose : M. Lareau, l'hon. M. Langelier et quelques autres dont j'ai l'opinion à mon département. Voyez ce qui se passe à Montréal ; j'oserais dire que la moitié des affaires judiciaires de toute la province sont faites à Montréal, par conséquent Montréal, à ce point de vue, a une très grande importance et mérite d'attirer l'attention de celui qui veut rendre efficace l'administration de la justice dans la province ; or, ce qui y arrive actuellement est intolérable.

Comme je l'ai déjà dit, une inscription en appel veut dire deux ans d'attente avant que l'on puisse avoir une décision. On m'informe positivement qu'une cause inscrite aux enquêtes et mérites ne peut être entendue que neuf mois après l'inscription ; est-ce là la célérité que réclame les opinions modernes sur l'administration de la justice ; on a beau dire que cela dépend des juges, l'on a essayé de toutes les façons par une législation morcelée, de remédier à ces abus, l'on n'a pas réussi et les efforts que l'on a faits

me prouvent qu'il n'y a qu'un changement radical qui puisse y porter remède. A Sherbrooke encore, le juge de la cour supérieure est surchargé d'ouvrage, tandis qu'il y a 10 ou 12 juges dans d'autres districts qui n'ont certainement pas trois mois d'ouvrage pendant toute l'année. J'ai déjà signalé la plainte que l'on fait entendre contre la cour de révision telle qu'actuellement organisée. Voilà des faits qui vous prouvent que le système qui existe actuellement, ne rencontre plus les besoins des justiciables.

Q.—Les avocats se plaignent-ils du système actuel ?

R.—Un certain nombre, oui ; d'autres sont satisfaits. Mais je prétends que l'on doit plutôt considérer les intérêts des justiciables que les intérêts des avocats.

BREACH OF PROMISE OF MARRIAGE.

The result of the case of *Shepherd v. White*—tried before Mr. Justice Hawkins and a special jury last week—is calculated to diminish the anxiety with which intelligent men have for some time regarded the abuses of actions for breach of promise of marriage. The injured plaintiff was a parlour-maid in the service of a lady at Finsbury Park, while the faithless Lothario was an old gentleman of feeble mental power, boarding under the roof and living under the practical tutelage of his *inamorata's* mistress (who was his sister) and her husband. There was no doubt that a promise of marriage (conditional on the consent of the defendant's sister being obtained) had been made; and although the defendant's gifts of conversation did not rise above the level of disjointed observations on the carts that were passing and repassing the window of his boarding-house, and although even on the momentous morning which was to determine the fate of the action against him, he talked of nothing but the family cat and the omnibus by which he was to be conveyed to the Law Courts, it is tolerably clear that he possessed the modest degree of capacity necessary in law to the formation of a valid contract of marriage. The plaintiff's technical right to relief was, therefore, complete—if we except the condition as to the consent of the defendant's sister. But the jury, taking into consideration the lightness of the defendant's mental calibre, and the possibility that his chief attractiveness in the eyes of the plaintiff lay in the

fact that he was worth about 300*l.* a year, awarded her one farthing damages—a verdict to which Mr. Justice Hawkins promptly gave its legitimate effect by depriving her of costs. In spite of the doubt recently expressed by Lord Coleridge in the case of *Austin v. Harding*—a still more flagrant abuse of the action of breach of promise, happily defeated by the application of the rule laid down by the Court of Appeal in *Finlay v. Chirney*, L. R. 20 Q. B. Div. 494—whether this legal remedy ought to be continued, at least in its present unrestricted form, there are cases in which the heavy damages and the incidental exposure obtainable by a direct action for breach of promise are effective weapons in the hands of justice, and we are not quite convinced that they could with advantage be laid aside. The suggestion made in a contemporary that every promise of marriage should be required to be in writing, and should be subject to a stamp duty of 1*l.* would not meet such cases as *Austin v. Harding* and *Shepherd v. White* at all. We have more confidence in the efficacy of a few verdicts for the defendant, or for the plaintiff with a farthing damages, followed by the penalty of deprivation of costs.—*Law Journal*.

BURNING AT THE STAKE.

Lynching is bad enough in any view; but the lynching of a negro accused of murder, at Bardwell, Kentucky, recently, would have been worse than it was if the wretched man had been put to death by burning, as was at first seriously proposed, instead of by hanging.

It is difficult to see what the community gained by the proceeding, even assuming that the person put to death was unquestionably the guilty man. He would undoubtedly have been executed in due season according to law if the populace had not interfered.

A queer feature of the uprising which resulted in this lynching was the cool and comparatively calm way in which preparations were made to burn the accused man at the stake. There seems to have been in the minds of the people an idea that their deed, although lawless, would be less reprehensible if they proceeded with order and deliberation.

But the legislature of Kentucky itself could not make burning at the stake a lawful punishment even for the most fiendish of

crimes. The Constitution of that State would have to be changed first. That instrument expressly declares that excessive bail shall not be required, nor excessive fines or cruel punishments inflicted.

It may not be generally known that even in the colony of New York there was a time when criminals were burned at the stake. In the year 1707 an Indian slave and a negro woman were tried for murder by a special commission in this colony. Both were convicted, and the man was executed by hanging and the woman by burning. In 1712 twenty-one slaves were executed in the colony for being concerned in an insurrection which resulted in the killing of a number of white persons, and some of the convicts were put to death by burning. Still later, as a result of what was known as the negro plot of 1741 and 1742, thirteen negroes were burned at the stake. Finally, in 1772, or in the following year, a black who had been convicted of an assault upon a woman was burned at the stake in Johnstown, which place was at that time the county seat of what was then Tyron county, named after the ancestor of the admiral who recently lost his life in the Mediterranean. These and other examples of cruel punishments were given in an interesting opinion which was delivered thirty years ago in the General Term of the sixth judicial district, by Judge William W. Campbell, of the Supreme Court of this State, for the purpose of showing, as he said, that there had been good cause for the prohibition in the Constitution against cruel and unusual punishments.

Most people will probably be as much surprised to learn that burning at the stake was ever a legal method of inflicting the death penalty in New York as they would be to learn that there was a time in England when poisoners were lawfully boiled to death. Such however is the fact.—*New York Sun*.

JUSTICE IN FRANCE.

There is no country where more extraordinary scenes are to be witnessed in courts of justice than in France. The other day a military prisoner was being tried by court-martial upon a charge of theft, and in due course he was asked by the president whether he had anything to say in his defence.

"Yes, mon Colonel," he replied, and pointing to the captain

who had been conducting the prosecution, "I ask that a truss of hay be voted for that donkey." The remark startled the members of the court to such a degree that it took them some moments to recover their equanimity, whereupon they sentenced the prisoner to six months' imprisonment for theft and to ten years' detention, with hard labor, for insulting a member of the court.

A similar incident took place a few days previously at the Palais de Justice. A poor fellow, having just heard himself condemned to five months' imprisonment for an offence described as vagrancy, but which merely consisted in pursuing his calling as a street musician, was wrought up to such a pitch by the severity of his punishment, and by the prospect of his wife and children being left without support for so long a time, that he vociferated just as he was being led away: "You are nothing but executioners: it is abominable. The big judge has had his eyes closed during the whole trial." By order of the court the prisoner was brought back to the dock, and five minutes later the poor wretch heard himself sentenced to five years' penal servitude for having insulted the court.

This recalls to mind an incident in the career of Gambetta prior to the overthrow of the empire. He was in the act of addressing the court in behalf of a prisoner, when suddenly he perceived that the presiding judge was visibly dozing. He paused for a moment, and then bringing down his fist with a terrible thump on the desk in front of him, he shouted in his most resonant and clarion-like voice: "As I was saying before the awakening of the court." This apostrophe was immediately punished by the indignant judge suspending the young lawyer from practising his profession for a period of two months.

Less energetic, yet equally effective, was the well-known and popular academician and lawyer, Maitre Rousse, who, having likewise observed that the presiding magistrate was indulging in a nap, suddenly stopped talking. The prolonged silence, which lasted for four minutes, had the effect of awakening the judge, and as soon as he opened his eyes Maitre Rousse made a profound bow and resumed his speech, as follows: "As I was saying, mesieurs de la cour, at your last audience," laying special stress on the word "last." The reproof was so delicate that everybody smiled, even including the judge himself.—*Boston Journal*.

GENERAL NOTES.

WOMEN AT THE BAR.—Eight of the 110 female lawyers of the United States have acquired the right to practise before the Supreme Court of that country.

WHY HE LOST.—A learned judge, while at the bar, unexpectedly lost a case for a client who was a justice of the peace, and in his own opinion a very learned one. The judge was at a loss how to explain the cause satisfactorily to him when they met, but he did it as follows: "Squire, I could not exactly explain it to an ordinary man, but to an intelligent man like you, who are so well posted in law and law phrases, I need only say that the judge said that the case was *coram non judice*." "Ah!" said the client, looking very wise and drawing a long breath, "if things got into that fix I think we did very well to get out of it as easy as we did."

HINTS TO STUDENTS.—The late Sir Andrew Clark, in addressing his students on one occasion, said he presumed those present would like to know from him what conditions he thought were essential to make a man a successful physician. Here are the opinions he expressed on this point: "Firstly, I believe that every man's success is within himself, and must come out of himself. No true, abiding and just success can come to any man in any other way. Secondly, a man must be seriously in earnest. He must act with singleness of heart and purpose; he must do with all his might and with all his concentration of thought the one thing at the one time which he is called upon to do. And if some of my young friends should say here, 'I cannot do that—I cannot love work,' then I answer that there is a certain remedy, and it is work. Work in spite of yourself, and make the habit of work, and when the habit of work is formed it will be transfigured into the love of work; and at last you will not only abhor idleness, but you will have no happiness out of the work which then you are constrained from love to do. Thirdly, the man must be charitable, not censorious—self-effacing, not self-seeking; and he must try at once to think and to do the best for his rivals and antagonists that can be done. Fourthly, the man must believe that labor is life, that successful labor is life and gladness, and that successful labor, with high aims and just objects, will bring to him the fullest, truest and happiest life that can be lived upon the earth."

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CURRENT TOPICS AND CASES.

Several judicial appointments have been made recently. The vacancy on the Superior Court bench at Montreal, caused by the appointment of Mr. Justice Wurtele to the Court of Appeal, has been filled by the appointment of Mr. J. S. Archibald, Q.C., and the new Circuit Court judgeships at Montreal by the appointment of the district magistrates, Messrs. Barry and Champagne. It is to be regretted that in each instance a long delay has occurred before the nominations were announced. It has frequently been pointed out in this journal that in England such appointments are made with the utmost promptitude, and the expediency of dispatch in this matter surely need not be insisted upon. It is about two years since Mr. Justice Wurtele was first appointed an assistant judge of the Queen's Bench, and more than a year since he was formally appointed one of the justices of that court. During all this time there has been a vacancy on the Superior Court bench, notwithstanding the pressure of work in that court. The delay is all the more singular since it was confidently stated two years ago that the gentleman now named would have the nomination. Then, in the case of the Circuit Court judgeships, the Magistrate's Court was abolished five months ago, and

the work has since devolved upon the Superior Court judges in Montreal. After a lapse of five months, the district magistrates have somewhat unexpectedly been appointed judges of the Circuit Court. Here again it would have been very desirable by prompt action to have prevented the names of other gentlemen from being discussed in the newspapers as candidates for the vacant positions.

As regards the Superior Court appointment, Mr. Archibald has been a hard-working and successful lawyer, and coming to the bench as he does with ripe experience, there is every reason to expect that he will be an efficient and capable judge.

In *Toupin v. The Montreal Harbour Commissioners*, Superior Court, Davidson, J., Montreal, June 30, 1893, it was held that the Board of Harbour Commissioners, Montreal, constituting in its corporate character the "pilotage authority" of the pilotage district, has no power to delegate to a committee its functions with respect to the investigation of charges against pilots. This nullity cannot be covered by acquiescence on the part of the accused. It was also held that the law requires the evidence in such investigations to be taken upon oath. Three commissioners make a quorum for such investigations, so that no inconvenience need result from requiring the Board to sit as a Board.

The attack made some time ago by one Norcross upon Russell Sage has given rise to a peculiar claim for damages, which came recently before the N. Y. Supreme Court—*Laidlaw v. Russell Sage*. A letter had been handed to the defendant, Sage, by a visitor, containing a threat that if he did not give said visitor a large sum of money, the latter would immediately explode a package of dynamite then in his possession. Plaintiff, who was ignorant

of the contents of the letter, and that any threat had been made, allowed defendant to gently draw him toward defendant and turn him round so as to bring plaintiff's body between defendant and the visitor. An explosion then occurred through which plaintiff sustained severe injuries. The Supreme Court held that such facts presumptively established a cause of action in favour of plaintiff against defendant; that the burden of proof was not on plaintiff to show that he would have been less seriously injured or not injured at all if he had been let alone, but that the burden of proof was on defendant, if he wished to avail himself of such defence, to show that without defendant's act plaintiff would have been equally injured. The judgment of the lower court was reversed, and a new trial ordered.

In *Bastien v. Labrie*, Superior Court, Pagnuelo, J., Montreal, Feb. 10, 1893, the action was for the recovery of the amount of several promissory notes made by the defendant to the order of a firm which had become insolvent. The notes had been sold by the curator, and had been endorsed by him. The court held that the endorsement constituted a valid transfer, and that it was sufficient for the plaintiff (the purchaser of the notes) to exhibit the endorsement to the maker, to notify him of the sale and prove the fact of the sale.

In *Mare v. Cleveland*, Superior Court, Davidson, J., Montreal, May 10, 1893, it was held that the defendant filing a *requête civile* is in the position of a plaintiff in respect of the *requête civile*, and, if a non-resident, is bound to satisfy the requirements of Article 29 of the Civil Code, as to giving security for costs and producing a power of attorney.

A question interesting to lawyers was decided in the Superior Court by Mr. Justice de Lorimier, Montreal,

June 27, 1893. Article 205 of the Code of Civil Procedure says : " A party's revocation of the powers of his attorney will not be received unless he pays him his fees and disbursements, taxed after hearing or notice given to the party." The question was whether the attorney revoked could claim disbursements not taxable in the bill, such as travelling expenses, etc., or payments for services rendered by other parties in connection with the suit, or a retainer promised him by his client. The article plainly points to a taxed bill, and the court held that the substitution could not be delayed by contestations which might arise upon other demands of the attorney upon the client, even if perfectly legitimate in themselves.

*BELAIR v. LA VILLE DE MAISONNEUVE—
INJUNCTION—RIGHTS OF RATEPAYER.*

The notes of Mr. Justice Doherty in this case were not received in time to be included in the report, R.J.Q., 1 C.S. 181. Mr. Justice Pagnuelo, however, had this written opinion before him, and referred to it and followed the holding, in *J. G. Ross v. The Merchants Telephone Co.*, in which, on the 4th October, 1893, the issue of the writ was refused.

DOHERTY, J. :—

This case together with two others, that of *The Edison Electric Co. v. Barsalou*, and *Sentcal v. The Town of Maisonneuve & Edison Electric Company*, arise out of a decision arrived at by the Council of the Town of Maisonneuve on the 21st September to light the town by the electric light.

In pursuance of this decision they instructed their engineer, Mr. Vanier, to advertise for tenders for furnishing the apparatus necessary for such lighting, in accordance with specifications prepared by him and approved by the council.

In response to his advertisements several tenders were received, and among others one from the company defendant and one from the Edison Electric Company. The former offered to

do the work required for \$9,500, and the latter for the sum of \$10,900.

These tenders were opened on the 5th of October, and the council by resolution then authorized the mayor, Mr. Barsalou, and the Light Committee, composed of Councillors Dudevoir, McQuade and Belair, to give the contract to whomsoever they should deem proper, after taking further information.

These gentlemen appear to have made inquiries, and looked at different electric systems, but took no definite action.

On the 7th October a regular meeting of the council was held, at which after the reading of the minutes it was resolved to hold the meeting with closed doors, and the council withdrew from the public hall into a small room at one corner of the platform. Here some discussion was had concerning the different tenders, and a letter was produced from the Edison Electric Co. offering to do the work in question for \$9,400, being a deduction of \$1,549 off their original tender, and making their price \$100 less than that of the Royal Electric Co.

Thereupon a resolution was moved and seconded, "That the contract for the electric light be granted to the Edison General Electric Co., according to the plans and specifications prepared by the engineer, at the price of \$9,400 mentioned in their amended tender of 7th October, 1891."

To this motion it was proposed in amendment "That the contract be granted to the Royal Electric Co."

The amendment being put to the vote was lost, Councillors McQuade and Bennett voting for it, and Councillors Dudevoir, Belair, Goyette and Champagne against it, and the main motion being then put was carried on a similar division, the four who had voted against the amendment voting for the motion, and *vice versa*.

A motion was then carried, so far as the minutes show, without division, authorizing the Mayor to sign the contract for the electric light.

On coming out from the meeting the Mayor would appear to have stated in the presence of the persons in the public hall, among whom were the agents of both the Royal and Edison Electric Companies, that the latter had got the contract.

The next morning the manager of the Edison Co. sent to the secretary-treasurer of the municipality and obtained from him a copy of the resolution awarding the contract, sent also to the

town engineer and obtained instructions from him, and at once set to work to put up its apparatus.

The mayor would appear not to have approved of such great haste, and on the 9th October caused the secretary to write a letter to the Edison Co., informing said company that he, the secretary, had no authority to deliver copy of the resolution of the 7th, granting the contract for electric plant to the Edison Co., and requesting said company not to take any action on said resolution (Plaintiffs' Exhibit A'). Prior to this, on the 8th, the manager of the company had written the secretary of the municipality, informing him that in accordance with the resolution they had commenced work, and would have it completed within the time specified (Plaintiffs' Exhibit 3). It appears also that on the 8th the mayor telephoned the town engineer to tell the Edison Co. to stop work, and that he, the engineer, communicated the message to the company—and that on the 10th the mayor wrote them to the same effect, but the latter did not recognize the authority of the mayor to stop them.

On the 12th of October a motion was made to reconsider the motion of the 7th granting the contract to the Edison Co., and a counter motion, called an amendment, to the effect that "seeing the opinion of the attorney of the corporation on the question of the electric light, saying that the resolutions of the last meeting are regular, the resolution of the last meeting granting the contract of the electric light to the Edison General Electric Co. be reconsidered.

This so-called amendment being put to the vote was lost, three councillors, Dudevoir, Goyette and Belair voting for it, and three, McQuade, Bennett and Champagne voting against it, and the mayor giving his casting vote against it. The motion for reconsideration would appear to have been then put and carried on a similar division. The minutes of the meeting do not show this motion to have been so put, but by a correction ordered before adoption of such minutes at the subsequent meeting it is made to appear.

A motion was then made that the contract be given to the Royal Electric Co., to which it was moved in amendment that "the contract being granted to the Edison General Electric Co., it be not resolved to grant it to the Royal Electric Co., because opinions of lawyers have been furnished us declaring regular the resolution of the last meeting, granting the contract to the

Edison General Electric Co." This amendment was carried by a vote of 4 to 2, Councillor Champagne, who had voted for the reconsideration, voting in favor of the amendment. It was then resolved that the council generally take the opinions of the following counsel on the question of the contract for electric light granted the Edison General Electric Co., to wit, M.M. Beauchamp, Roy, Lafamme and Augé, and that for that purpose the meeting be adjourned to Thursday the 15th.

On the latter date, after the council had heard the opinions of the counsel above-named, and taken communication of a letter from the Royal Company offering to provide the required system of electric lighting for \$9,300, and another letter from the same company binding itself to hold the corporation indemnified of any claim in damages that might result from the granting by the town to the Royal Company of the contract, and a letter from the attorneys of the Edison Company threatening legal proceedings in the event of the corporation's rescinding or violating the contract made with that company, it was moved by Wm. Bennett and seconded by D. McQuade "that the contract for the electric lighting be granted to the Royal Company for \$9,300 as mentioned in its tender of that date." To this motion an amendment was proposed to the effect "that seeing the contract had been granted on the 7th to the Edison Company, and everything had been legally done, it be not resolved to withdraw the contract from that company and give it to another." On this amendment the councillors divided equally, Councillors McQuade, Bennett and Champagne voting against it, and Councillors Dudevair, Belair and Goyette for it. The mayor gave his casting vote against the amendment, and the main motion was carried on a similar division—and the meeting adjourned.

At the regular meeting held on the 21st, it was resolved, on a vote of three to two, that the engineer be instructed to give all necessary instructions to the Royal Co. to proceed with the work.

Meanwhile, on the 16th, the mayor had signed the notarial contract for the work with the Royal Company.

The latter company then set to work to perform its contract—the Edison being already, as has been stated, engaged in doing the same, although the Mayor, when called upon by them to sign, and tendered for signature on the 9th of October a draft of a

notarial contract for said work in accordance with the resolution of the 7th, had refused to sign it.

The foregoing facts have given rise to the three suits above mentioned.

By the first of these, directed against the Royal Electric Company and the town of Maisonneuve, and instituted on the 23rd of October last, Dolphis Belair, a ratepayer and voter of the town of Maisonneuve, seeks to have the resolution of the council of the 15th October, accepting the tender of the Royal Company of that date, declared to have been and to be illegal, irregular, null, void and of no force and effect, and to have the contract between said town and said company, passed as above recited, declared null and void, and cancelled and set aside, to have the said company ordered to suspend all works under said contract pending the suit, and that by the final judgment it be ordered that all works done by the said company be destroyed and demolished at the expense of the company.

On the same date, and by a petition to which is annexed a copy of his declaration, plaintiff set forth that all the allegations of his declaration were true, that it was necessary in his interest and that of the municipality of Maisonneuve that an order should be given or a writ should issue restraining and preventing defendants from continuing any work under the aforesaid contract; that the company defendant were carrying out the work under said contract and resolution to the great damage and injury of said municipality and plaintiff, and were moreover destroying and preventing the work being carried on by the Edison Company, which action on the part of the said company he alleged would do irreparable damage to said municipality and cause great loss, and prayed for an order or writ such as by him declared to be necessary.

Upon this petition, supported by an affidavit of petitioner affirming the truth of the allegations of his declaration and petition, and subject to the plaintiff's giving \$600 security for costs, a writ was ordered to issue and issued restraining defendants from doing any work under the contract mentioned in the petition till further ordered.

Upon service of this writ of injunction defendant, the Royal Electric Company, petitioned to have the same returned at once, and to have the order therein contained suspended pending the final adjudication upon said writ of injunction. The writ was

ordered to be returned at once, but the other conclusions of the petition were rejected.

Defendant, the Royal Electric Company, then by an answer or defence to the declaration and petition for said writ of injunction, contested the right to said writ, and it is upon the issue upon the contestation of said writ of injunction, not upon the merits of the action to annul the resolution and contract and order the demolition of works done under it, that the case is before this court.

As has been said, the plaintiff embodies in or rather annexes to his petition for the injunction his declaration in the principal action, and relies upon its allegations as forming part of his petition.

This declaration recites in detail the proceedings of the council as above set forth, and claims that the resolution of the 15th October granting the contract to the Royal Company was and is null, for the following reasons:

10. Because it was carried at an irregularly called meeting.

20. Because it was passed without any motion having been adopted for the reconsideration of the resolution of the 7th accepting the tender of the Edison Company for the same work, and after the council had reaffirmed said resolution of the 7th.

30. Because one of the councillors, Louis Champagne, who voted for the resolution attacked, was interested in the question, fearing to lose his employment with the St. Lawrence Sugar Refining Company unless he voted for said resolution—such fear on his part being induced by parties interested with and for said Royal Electric Company.

40. Because on said date there was a legal and valid contract in force between said corporation and the Edison Company for the only work authorized or sanctioned by the council for the lighting of the said town.

50. Because the time had expired for receiving tenders.

The contract is claimed to be null by reason of the nullity of the resolution upon which it was based.

The declaration then goes on to allege that the Royal Company is proceeding with the work, that the Edison system is the best, that the tender of the Edison Company was legal and regular, and legally and regularly affirmed by the council; that the mayor illegally refused to sign the contract with the Edison Company; that the said refusal of the mayor, the pretended ac-

ceptance of the tender of the Royal Company and the work done thereunder, will injure and cause harm to the municipality, and injure and destroy its property, and expose it to actions of damages, and that plaintiff as a rate-payer has a right to demand the nullity of said contract and the resolution whereon it was based, and concludes as already stated.

By its defence or answer to this petition and declaration the defendant, the Royal Electric Company, after generally denying the allegations of the petition, and more especially,

10. That any notice of the resolution of the 7th was given the Edison Company.

20. That the motion to reconsider the said resolution of the 7th was not carried.

30. That there ever was any contract between the Edison Company and the municipality.

40. That Councillor Champagne was interested in the contract, or acted under influence of fear, or that he was threatened by the company or any person for it, or in its interest.

50. That the company's works cause any damage to the municipality or its property—

goes on to allege:

"That the plaintiff is without right on the face of the allegations of his declaration to ask and obtain a writ of injunction, and that he is also without interest to take this suit;

"That plaintiff is not a proprietor of real estate in the municipality, that he pays no taxes, is neither elector nor rate-payer, that he is not and will not be called upon to contribute anything to the cost of the electric plant in question, and the defendant's works have caused, cause, and can cause him no damage;

That plaintiff is a mere *prête-nom* for the Edison Company;

That defendant's works cause no damage to plaintiff, nor to any rate-payer of the municipality or the municipality itself, and that even were the latter exposed to any difficulty, inconvenience or damage resulting therefrom, it would have ample recourse at common law, without recourse to the writ of injunction;

That the municipality is protected by the guarantee of the Royal Company;

That the suspension of the work will cause immense damage to the company;

That in reconsidering the first resolution granting the contract to the Edison, and even in resiliating a contract made with them

had there been a contract, and making one with another company, the council acted within its rights, and that the courts have no power to interfere, the matter being in the discretion and within the jurisdiction of the council ;

That a valid contract having been signed and executed, plaintiff cannot by a writ of injunction ask that it be not carried out, so long as it has not been annulled.

The plea then proceeds to attack the contract claimed to have been made with the Edison Company, claiming that the latter company had no right to take possession of the streets of Maisonneuve, or do any work therein ; that it had no contract with the town ; that all proceedings at the meeting of the 7th were null, said meeting having been held with closed doors, and not publicly as required by law ; that said resolution was irregular and null, the council being bound to accept the lowest tender, which the Edison's first tender was not, and having no right to allow any tender to be changed without notice to other tenderers, which was done by collusion between the Edison Company and certain members and employees of the council ; that said resolution was to be followed by a contract, and until such contract was passed there was no engagement between the parties, and the resolution remained the property of the corporation, and was reconsidered before any effect had been given to it, the Edison Company being notified by the mayor to do no work in virtue of it, and notified of its reconsideration ;

That the only contract in existence was that with the Royal, which was valid and binding.

The plea concludes by asking that the resolution of the 7th be declared null as against public order, and the writ of injunction quashed.

By his answer to this *défense* plaintiff redeclares the allegations of his declaration, reaffirms his being a rate-payer of the municipality, and as such having an interest to bring the suit, but does not allege that he suffers or is exposed to suffer any special damage by reason of the works sought to be restrained, and which as he alleges cause damage to and impede the streets of the municipality. He then contradicts in detail the allegations of the defence, and sets up efforts made since the institution of the action to obtain a meeting of the council and the repeal of the resolution complained of, and their non-success by reason of the Mayor, McQuade, Bennett and Champagne absenting themselves,

Councillor Champagne being prevented from attending by persons interested for defendants, and that at the regular meeting of the 4th November a motion in effect repealing the resolution of the 15th was proposed, and an amendment negating the same, and Champagne's vote thereon challenged on the ground of his being interested, which question the mayor illegally refused to put—and adds that the town of Maisonneuve does not contest because it is well aware that plaintiff's pretensions are well founded.

Upon the issues so joined a vast amount of evidence was taken, and the numerous important and interesting questions ably and exhaustively argued by the counsel of the parties.

The first question which the court is called upon to decide is that raised by the allegations of defendant's plea, putting in issue plaintiff's right to demand a writ of injunction.

It is to be remarked that the declaration and the petition contain no averment that any special damage will be suffered by Dolphis Belair, the plaintiff, by reason of the works sought to be enjoined. The declaration speaks solely of damage to be suffered by the municipality, and by its rate-payers generally, and though the petition of which this declaration is made to form part, alleges that the company defendant is carrying on its works to the great damage and injury of the said municipality and of plaintiff, this can hardly be said to amount to an allegation that plaintiff thereby suffers or is exposed to suffer any special damage particular to himself, and different from that which may result to every rate-payer from an injury done the corporation as a body.

The declaration and petition also make no special mention of the nature of the damage to be suffered by the municipality beyond speaking of it as damage to its property, and injury resulting from its being exposed to actions of damages.

The answer to the plea goes a step further, and specifies as one cause of damage that the works impede the streets of the municipality.

The evidence shows that the works sought to be enjoined consist in the main in the digging of holes for the planting of poles, the erection of such poles in the streets of Maisonneuve, the stringing of electric wires upon such poles—and the immediate injury resulting consists in the obstruction of such streets, and the ultimate damage apprehended is that of the responsibility in

damages of the corporation towards the Edison Company for injury resulting to it, should it be ultimately decided that that company had a valid contract for doing the work, by such work being interfered with by the operations of the defendant company. It is also contended that the putting up of both systems in the town may cause what is described as "electrical perturbations," a calamity the precise nature of which is not described.

It is to be said, also, that plaintiff's quality of elector is proven.

This being the general nature of the evidence, it clearly cannot for a moment be pretended that—whatever may be said as to there being any allegation of special damage suffered or apprehended by plaintiff—he either suffers or is exposed to suffer any special damage peculiar to himself as distinct from the general body of rate-payers, resulting from the works of defendant.

Indeed, at the argument the court did not understand it to be pretended that any such damage had been suffered or was apprehended by him—the contention being that as a rate-payer, he was entitled to an injunction to restrain the doing of works injurious to the municipality—or to an order in the nature of an injunction to suspend such works pending the decision of his action to annul the resolution in virtue of which the contract for said works was given.

Plaintiff claims to be entitled to the writ of injunction under subsections 1 and 3 of art. 1033a C.C.P.

The first of these sections provides for the issue of an injunction where a corporation, without right and without having complied with the formalities prescribed by law or by its charter, takes possession, or causes to be taken for it, possession of lands belonging to another, or makes or causes to be made upon lands belonging to another excavations or works of demolition or construction, and subsection 3 gives the same remedy where a person does anything in violation of a written contract or agreement.

It does not appear to the court that either of these subsections applies to the case here.

The first subsection is clearly meant to apply to the case of a corporate body, as such, taking possession of lands or causing possession to be taken of lands, or doing or causing works to be done upon lands belonging to another, and this without having complied with the formalities prescribed by law or its charter, to enable it so to do, which is not the case here, the complaint not being that the Royal Company is, as a corporate body, taking

possession of or doing works upon lands which the law would permit it to take or do, provided only it complied with certain formalities prescribed as a condition precedent to such action on its part, as would be, for example, the taking possession by a railway company or municipal corporation of lands it was authorized to expropriate, but without compliance with the formalities imposed upon it in order to the exercise of such right. What is sought to be restrained here is an alleged unlawful act being done by an incorporated company it is true, but not in virtue of any particular right claimed to belong to it *qua* corporation, but as claiming to be party to a particular contract alleged to be illegal and null, a contract which might be undertaken by a private individual as well as by a body corporate.

It would seem equally clear that subsection 3 is meant to apply to a person doing something in violation of a written agreement to which he is a party, and binding upon him. And here it is not contended that the Royal Company is under any contract, written or unwritten, binding it not to do the works in question, but at most that it should not be allowed to do them, because another company has a contract with the municipality, authorizing such latter company to do said works.

[To be concluded in next issue.]

CORONERS' INQUESTS IN ENGLAND.

A select committee of Parliament has been enquiring into the law and practice of coroners' inquests in England. Among others who gave evidence was Mr. George Collier, deputy coroner for Southwest Middlesex and secretary of the Coroners' society, who, among other things, thought that the public safety required that no deaths should be registered, unless the informant produced to the registrar a certificate of a certified medical practitioner stating the cause, and that no order for burial should be issued by the registrar, unless such death certificate was produced. It would, in witness' view, be an advantage to the coroner to have an independent medical man to examine into the cause of death in doubtful cases.

Dr. H. Nelson Hardy, police surgeon at Dulwich, was frequently called to deaths of a suspicious nature. Five per cent of the deaths were not certified, or, if certified, the true cause of death was not given. Whilst the coroner's enquiry might be satisfactory to the jury and coroner, the verdict of "death from

natural causes" or "by the visitation of God" did not give the real cause of death. Coroners' enquiries were often nothing but a farce. To show the loose way in which certificates were granted, witness quoted cases attended by him in which he refused to give certificates, but where certificates had been obtained from persons who had not been in attendance for a long time and were accepted by the registrar. Witness would suggest that in all cases where death was not certified by a qualified medical man, the matter should be referred to the police surgeon of the district for investigation.

WOMEN AT THE BAR.

Just at present the principal topic of professional interest seems to be the position of women at the bar. Chief Justice Bleckley, of Georgia, has recently delivered an address on "The Future of Women at the Georgia Bar," which was printed in the *Atlanta Herald* for July 9th, and is certainly deserving of publication in more permanent form. The address exhibits the characteristic qualities of the learned and gifted jurist's style—a style in which wit and wisdom go always hand in hand. His wisdom never becomes dry or unpalatable, but one never misses Judge Bleckley's thoughtfulness and serious purpose through his very attractive way of putting things. Perhaps we can discern an underlying protest of the sensibilities of one educated in an earlier generation than ours, against the full recognition of female lawyers; but the peroration evinces a sufficiently clear perception of the probabilities of the future.

"My prediction is that there will some time be a career for women on the bench and at the bar of Georgia, and even in legislation, but when, this deponent saith not. Until the public mind is prepared for such a delicate innovation, Georgia law must continue in its present state of half orphanage, and forego the care of any but the one parent from whom it has descended. It has no mother."

The Bench and Bar column of last Sunday's *Tribune* contained a graceful and well deserved tribute to Mrs. Myra Bradwell, the editress of the *Chicago Legal News*. We are glad to join in the appreciation there expressed of the great ability with which that periodical is uniformly conducted.

It appears that there is to be a convention of female lawyers at an early date at Chicago. These are some of the circumstances that have brought women's professional interests under special consideration at the present time.

For our own part, we resent theoretically at least, any specialization of "woman's position." The long history of injustice and oppression to which the female half of mankind has been subjected, has been largely due to just this process of specialization. We believe the traditional distinction between the male and female intellect is purely fanciful. Women are popularly supposed to rely principally on their intuitions and men on their reasoning faculties. Sober experience shows that the power of instantaneous apprehension of an actual state of facts is just as apt to exist in men as in women, and often to a greater degree in the former than in the latter. This is the faculty which explains the great practical success of rude and ignorant men in gigantic business enterprises. On the other hand, who has not met many apparently ill assorted couples, in which from a purely logical standpoint the grey mare was by all odds the better horse, the husband being the slave of prejudice and "intuition," and the wife capable of reasoning from known facts to their legitimate consequences? Such difference as exists between the male and female mind is not so much one of kind as of degree. The greatest achievements in all departments of human effort have as a rule been made by men, and we do not believe that the dependent and inferior position to which the female sex has been condemned in the past entirely accounts for the phenomenon. In art, in music, and in literature, women have practically stood on a fair footing of competition with men for many generations, and only in the single department of prose fiction have they produced anything of the first rank.

But the probable fact that women will not attain the highest places in the different departments of work offers not the slightest excuse for withholding from them by law equal property rights, equal political rights and an equal chance of success in any field they choose to enter. In the medical profession they have already made a decided mark largely because of the very circumstance of sex. Whether or not women are ever to be numbered among the greatest physicians and surgeons, there is no doubt but that in ordinary attendance upon females their services will often be more acceptable than those of male practitioners of equal ability. We do not anticipate anything like the same progress for women at the bar, principally on account of excessive competition. No doubt, women are mentally capable of rendering as valuable legal services as the average of male lawyers. But there are many motives outside of express talent for the law, which contribute to make our profession perhaps the most over-crowded of callings. For a woman of extraordinary legal capacity there is an opening at any time, although on account of prejudice and custom, her struggle will be a harder one than that of an equally gifted man. But the ranks of the profession are already surcharged with average ability, and from prudential motives we would counsel a woman merely bent on making a livelihood to choose some other sphere of effort.—*New York Law Journal*.

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CURRENT TOPICS AND CASES.

The interpretation of Art. 2090, C. C., by the Court of Appeal, in *Trudel & Parent* (Montreal, April 26, 1893), is interesting. The court below maintained an action brought by a chirographary creditor of an insolvent, to set aside the registration of a hypothec granted by him within thirty days of his insolvency. The Court of Appeal, reversing this decision, held that the declaration contained in Art. 2090, C. C., that "the registration of a title conferring real rights in or upon the immovable property of a person, made within the thirty days previous to his bankruptcy, is without effect," is not to be interpreted as making such registration an absolute nullity in any event, but only relatively to anyone having an established adverse interest and who has actually sustained prejudice or loss in consequence of such registration. As a result of this interpretation it follows that other creditors have no legal right to criticise such registration until it has been demonstrated by a judgment of distribution, or other equivalent legal procedure, that their claims remain unpaid, in whole or in part, as a direct consequence of such registration. In the present case a chirographary creditor of the insolvent, without waiting to see the result of the division of the debtor's estate,

attacked a transaction to which he was not a party, and asked, not that the obligation should be annulled, but that its registration should be cancelled. "What interest or right," asked Mr. Justice Hall, "has he to make that demand unless and until it is legally established that he is a real, not an imaginary sufferer by it? His only justification would be the assumption that the registration of the mortgage was an absolute nullity." His Honor referred to Art. 1033, C. C.: "A contract cannot be avoided unless it is made by the debtor (1) with intent to defraud, and (2) will have the effect of injuring the creditor." And Art. 2023 says: "Hypothec cannot be acquired, *to the prejudice of existing creditors*, upon the immovables of persons notoriously insolvent, or of traders within the thirty days previous to their bankruptcy." That is, as the present judgment holds, the hypothec is valid as between the parties, and even other creditors cannot attack it unless they are prejudiced by it.

In *Darling v. City of Montreal*, the Superior Court, Montreal, Doherty, J., May 4, 1893, held that a special assessment to defray the cost of an improvement in the city of Montreal, must be based upon the values of the properties declared to be benefited. An assessment roll not based on the values of the respective properties subject to the assessment, but made on the principle of dividing the whole area into sub-divisions and assessing each sub-division at a fixed rate per superficial foot, entirely irrespective of the values of the properties therein contained, is, it was held, contrary to the provisions of section 228 of the Montreal City Charter, (52 Vict., ch. 79), and will be annulled. As the assessment rolls in several cases have been based upon the same principle of superficial area instead of values, the decision affects a number of expropriations, and will, it is understood, be brought before the Court of Appeal.

For the second time within the year the bar of Montreal has sustained a very serious loss. During four and forty years the Hon. Mr. Laflamme, whose death occurred on the 7th instant, after a short illness, has been one of its busiest members. Speaking from personal observation during thirty-four of these years, we are inclined to believe that no voice has been more frequently heard in the courts, no face and form more constantly met in the legal orbit, than those of the brilliant advocate who will now be seen there no more. Mr. Laflamme was an excellent illustration of a type of lawyer unfortunately too rare. He possessed a firm grasp of the great principles of the law; he selected and applied with unerring promptness the principle which must control the case before him, and his judgment was sound and keen. In the difficult and important cases concerning successions, wills, and civil rights generally, he not only enjoyed a large practice in his own office, but his services were constantly in requisition as counsel by his *confrères*. With cheerful assiduity he supported an intellectual strain and accomplished an amount of work which, looked at in the total, seems enormous. Yet such was his devotion to his calling that he did not appear to feel the toil as much as younger men around him. About two years ago, for the first time, we heard him remark that the work of the lawyer is hard. Like other able men who have passed away within the last twenty years, he no doubt began to feel, when past the age of sixty, the physical exhaustion which often follows the exciting conflicts of the courts. Mr. Laflamme, however, to the last held his ground. He appeared recently in cases before the Privy Council and the Supreme Court, and in the last term of the Court of Appeal acted as counsel in a complicated case. Though confined to the house for a week only before his death, his health and strength had been perceptibly failing for two years previously. Mr. Laflamme was specially loved by the younger members of the profession. To many of

them he was well known as a lecturer in the law faculty of McGill University, and to all he was uniformly kind and considerate. In all his professional relations he was a shining example of courtesy and generosity. His death is keenly regretted by the whole bar, and among those of equal years leaves a void which cannot be filled.

It is a striking illustration of the wildness of popular impressions as to the gains of advocacy that Mr. Laflamme, like most of the able lawyers who have departed in recent years, seems to have died a poor man. Messrs. Carter, Doutre, Kerr, and others who might be mentioned, were all successful lawyers and fully occupied with important business during thirty or forty years. Yet in no case did the toil of the law bring them much more than the modest income which sufficed for the needs of their families.

Judges in England are not always remarkable for courtesy to counsel, but it is so short a time since Lord Justice Davey quitted the ranks of the profession that we are somewhat surprised to read in the *Law Journal*, of London, the following: "Lord Justice Davey to Mr. Oswald, Q.C.: 'What is the exact point of law which you are obscuring by your eloquence?'"

*BELAIR v. LA VILLE DE MAISONNEUVE—
INJUNCTION—RIGHTS OF RATEPAYER.*

[Concluded from p. 370.]

But it was further contended that the article was not limitative, that the court might issue injunctions in other cases not therein specified, or that at all events the court at common law and irrespective of the special provisions regarding injunctions, had power to issue a provisional order, pending any suit, to ensure the parties being maintained in the respective positions occupied by them at the time of its institution until final judgment.

That such power exists in the court irrespective of the Injunction Act would seem to be established by the jurisprudence of the country. It was so held in *Bourgoin v. M. N. C. Railway Co.*, 19 Jurist, p. 57, by the Court of Appeal, and by the Superior Court in *Carter v. Breakey*, 2 Q. L. R., p. 232.

But it is perhaps premature to decide whether or not such an injunction or suspensory order can issue at all, until it be first ascertained whether or not the party applying for it is in a position to ask for it, assuming the court to have the power to issue it, whether under the Injunction Act or at common law.

It is not pretended here that the works complained of are being done upon the property or lands of the petitioner, neither is it claimed that they are being so done in violation of any contract made with him, nor that from them results or will result any special damage to him. The defendant, the Royal Company, is sought to be restrained from doing work upon the property of the municipality, alleged to be in violation of a contract of said municipality with an outside party, and which, it is said, will result in damages to the said municipality.

Now, if we take these pretensions as being proven, and assume that they constitute a case where, at the instance of the party having a right to ask for it, the court has a right to issue an injunction or suspensory order, who is it that has a right to restrain such works, or to ask for the writ or order restraining them? Clearly the municipality has that right, should it choose to exercise it. Here it does not do so. Has the rate-payer or elector of the municipality the right to do so in his own name, merely as a rate-payer, and without showing any interest personal to himself, *i.e.*, that the works are injurious to him in any sense other than that in which what is injurious to the municipality may be said to injure every one of its rate-payers?

This is the question which must first of all be decided, for if it should appear that even assuming plaintiff to be entitled to the other conclusions of his action on the merits, *i.e.*, to have annulled the resolution of the 15th October last, and the contract based upon it, or assuming such resolution and contract to be absolutely null and non-existent, he has not the right to restrain the doing of the works complained of, then clearly he cannot have a right to suspend *pendente lite*, works which he would not have a right to permanently enjoin, or cause to be demolished had he succeeded in his action on the merits.

Now it appears by the evidence and is matter not disputed by either party, that the works sought to be restrained are being carried on upon the public streets of the town of Maisonneuve, and consist in the digging of holes in the said streets, planting of posts therein, stringing of wires on such poles—all of which it is claimed is being done without right or authorization by the company defendant, and injures and impedes said streets, causing damage to said municipality, both by the obstruction of said streets, and by exposing it to claims in damages on the part of a rival company claiming a right to do these works.

Assuming this to be established, assuming the resolution granting the contract to the company defendant, and the contract itself to be null, the position of that company would then be that of a person unlawfully trespassing upon the public streets, placing obstructions thereon and carrying on work thereon which would probably amount to a public nuisance.

Has a rate-payer, as such merely, the right to restrain such assumed unlawful action on the part of the company? To whom belongs the right of action to restrain or remove obstructions upon property in the public domain, as in this case upon the public highway?

The question is not a new one in our jurisprudence. It has presented itself a number of times for decision, though not so far as the court has been able to ascertain, in cases where an injunction was applied for before the works were completed, but in cases where the demolition of works already done, and which were alleged to obstruct public highways, either roads, or navigable rivers, was sought.

And it would seem safe to say that it has been uniformly decided that, save where the obstruction complained of, caused some special damage to the party complaining distinguishable from that suffered by the public generally, he had no right of action to abate the nuisance; that such action belonged to the public generally, and should be instituted by a public officer qualified to speak for the public generally, (who might be moved thereto by private persons acting as relators) or, under our municipal system, in the case of obstructions in roads, might also be taken by the municipality, which is declared proprietor of the roads, and is such for certain defined purposes.

Thus the Privy Council in the case of *Brown v. Gudy* (14 L.C.R., p. 220) lays down the law of Lower Canada as to

the right of action for demolition of any work erected without license on the public domain : " An officer suing on behalf of the public has a right, at his own instance or on the application of any person interested, to call for the demolition of any work erected without license on the public domain, and he is no more required to prove that the erection has occasioned actual damage to the public than a private person who complains of a wrongful invasion of his property is obliged to prove that it has occasioned actual damage to him. But although such officer may, if he thinks proper, take proceedings to abate the nuisance, he is not obliged, nor is it in all cases his duty to interfere.....

" If the public officer refuse to interfere, an individual who suffers injury is not prejudiced ; he has still his *action privée*, by which he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private action are said to be not only independent of each other, but essentially distinct, in their object. The fact that the place where the work is erected is public property, is of course very important in both cases, in regard to the right of the defendant to do what he has done, but it does not, according to the law as we can collect it from the authorities, *supersede* the necessity of the plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the plaintiff in this case has failed to do."

The case was one *en dénonciation de nouvel œuvre*, seeking the demolition of an alleged obstruction to a navigable river, the plaintiff being a riparian proprietor, and claiming, but not proving, special damage resulting from the alleged obstruction.

This judgment was followed by the Court of Appeal in a case of *Bourdon & Benard et al.*, (15 L.C.J., p. 60) where it was held " Que le droit de faire disparaître les obstructions et empiètements sur les chemins et rues publiques appartient *exclusivement* aux municipalités, et que les particuliers ne possèdent pas ce droit d'action à moins qu'il ne leur en résulte des dommages réels et spéciaux." This was the case of two proprietors, resident in Boucherville, complaining of an encroachment by defendant upon the public street of the municipality, and asking its removal. The encroachment was not denied and the case turned entirely on the question to whom belonged the right of action.

In rendering the judgment Caron, J., (p. 62) says: "Les autorités additionnelles produites depuis que la cause est en délibéré et surtout la décision de *Brown v. Gudy* me font croire que les demandeurs n'avaient pas l'action qu'ils ont portée; que ne souffrant personnellement pas autrement que le reste du public, c'était à l'autorité chargée de défendre les droits de ce public à prendre les démarches nécessaires pour le protéger des empiètements qui pouvaient être commis à son préjudice."

And Badgley, J., concurring, says, (p. 64) (after expressing a strong opinion that had it not been for the effect of the municipal law vesting the roads in the municipal corporation, such an action might have been taken as a popular action by a private individual,) "but the municipal law has taken its street authority into the power of the municipality alone, and the popular action can no longer avail to individuals; they may compel the municipal authorities to enforce the removal of encroachments on the public thoroughfare, but they cannot, any longer, themselves enforce the removal." The main *considérant* of the judgment rests on the absence of right in an individual to bring an action of this kind.

In *Bell v. The Corporation of Quebec*, 7 Q.L.R., p. 103, another case of an obstruction in an alleged navigable river, their Lordships of the Privy Council reaffirm the doctrine laid down in *Brown v. Gudy*, and after assimilating the position of riparian proprietors on a navigable river to that of proprietors of land adjoining a highway, hold that no action lies by such a proprietor for the removal of obstructions in such navigable river, in the absence of proof of special damage.

The doctrine seems likewise to be fully recognized as being in accordance as well with English law, as with our own by the different text-books on the subject of injunctions.

It would seem from these decisions abundantly clear that an individual showing himself to suffer no greater injury from an obstruction to the public highway than that common to the public generally, has no right of action to cause the removal of such obstruction, or the abatement of the nuisance thereby created. And there seems to be no good reason for holding that what he would not have a right to cause to be removed if placed on the public property, he has a right to prevent being placed there.

But it was argued that inasmuch as under sections 100 and 698 of the Municipal Code, (and 4329 Revised Statutes) plaintiff as an elector had a right to demand the annulment of the resolution on which the contract under which the works in question were being done is based, it necessarily follows that, as such elector, he must of course have the right of having the contract based on such resolution also annulled, and the works being done thereunder arrested, and those already done demolished.

No authority was cited bearing out this extension of the rights conferred upon a municipal elector by the sections referred to.

The court sitting here is not called upon to deal with the question whether or not the sections cited give to an elector the right, not only of demanding as against the members of the council, his representatives, the annulment of an illegal resolution, but the further right of exercising the right of action of the municipality against a third person to have annulled a contract entered into by said municipality with such third person in virtue of an illegally passed resolution.

This question will present itself for decision upon the trial of the principal case upon its merits—which case is not now before the court.

For the present what is to be dealt with is the pretension that because the law gives an elector a right to demand the annulment of a resolution, it also gives him a right to demand that any works being done by a third person claiming to act under such resolution be arrested, and those done, destroyed.

Now, having reached, as the court has, the conclusion that were defendant, the Royal Company, without any pretence of a resolution or contract authorizing them so to do, placing their poles and wires in the streets of Maisonneuve, plaintiff would have no right to restrain them by injunction, it would be an extraordinary position if he should have greater rights against a party acting under, at all events, the color of right given him by a resolution and a contract, both binding on the municipality till annulled, than he would have had against a person acting without any pretence of right and in open defiance of municipal authority.

This is a conclusion which it is impossible to arrive at, and yet it is the logical consequence of adopting the position in this respect contended for by plaintiff.

The reasoning which leads to such a conclusion cannot but be faulty. And, in fact, in this case it is based entirely upon the assumption that the law must have intended, in allowing the right of an elector to obtain the annulment of a resolution of a council, to give him, once that annulment obtained, the right to exercise all the actions which might result therefrom in favor of the municipality. Now the law certainly does not say that it so intends, and surely if such had been the design of the legislator he would have said so clearly and distinctly. Nor is the court aware of any system of logic, in which it is recognized as an axiom, that because one has a right to what may serve as the means to many ends, one is therefore entitled to all those ends to which it may be a means. Because I, as an elector, am given by the law the right to have annulled the illegal resolution passed by the councillors, and because such annulment relieves the municipality from the obligations purporting to be imposed upon it by such resolution, it by no means follows—in the absence of express legislation to that effect, that I have the right to exercise against third parties all the actions which the municipality so freed may have to exercise. On the contrary, once the resolution is annulled, and the municipality discharged in consequence from any responsibility, liability or obligation in virtue of it, my right of action would seem to be at an end, and it would then devolve upon the officers of the municipality charged with that duty to prevent encroachments on its property in virtue of any pretended rights under such annulled resolution. As said by Judge Badgley in *Bourdon & Benard* above cited, "individuals may compel the municipal authorities to enforce the removal of encroachments upon the public thoroughfare," (we might add, and other municipal properties or rights) "but they cannot themselves enforce the removal."

For these reasons the court is of opinion that the plaintiff has shown no sufficient interest, and consequently no right to obtain the writ of injunction prayed for by him, that neither suffering nor even pretending to suffer or apprehend any damage whatsoever peculiar to himself, and different from that common to all the public by the alleged unlawful works of defendant in the streets of Maisonneuve, he is, in asking for a writ of injunction, taking upon himself, without authorization, the protection of the public rights and those of the municipality, and in reality en-

deavoring to exercise a right which, if it exist at all in this particular case, belongs exclusively to and can alone be exercised by the municipal authorities of Maisonneuve, and, in their default, if at all, solely by a public officer properly authorized to represent and act for the general public, and not in any case by a private individual in plaintiff's position, and in consequence the injunction is dissolved.

This case being before the court only on the writ of injunction, and evidence and argument on the questions raised by the principal action having been gone into only for the purpose of establishing whether or not plaintiff's case was *prima facie* sufficiently strong on the merits to justify the issue of the writ of injunction, and the court having reached the above conclusion as regards the absence of the right to the injunction, however strong plaintiff's case on the merits, the court is not merely not called upon in this case, but has no right to pronounce any opinion upon the numerous other important questions raised by the pleadings.

EFFECT OF CULTURE ON VITALITY.

So far from intellectual work diminishing vitality, the chiefs of all intellectual professions are, and in recent times have been, men who have passed the ordinary term of years with undiminished powers. In politics, the principal leaders whom this generation have known, have been Earl Russell, Lord Palmerston, Lord Beaconsfield and Mr. Gladstone, and every one of the three was at seventy in full vigor, while the last, at eighty-three, is coercing a reluctant party to endorse a policy which the people of England determinately reject. The great statesman of the continent, Prince Bismarck, remains at seventy-eight a force with which his government has to reckon; while the will of Leo XIII, an exceptionally intellectual pope, at eighty-three, is felt in every corner of the world. The most intellectual and successful soldier of our time, the man who has really thought out victories, Marshal von Moltke, was an unbroken man at ninety and more years. No men dare compare themselves in literary power with Tennyson or Carlyle, Victor Hugo or Von Ranke, and they all reached the age which the author of Ecclesiastes declared to be marked only by labour and sorrow, as also did Professor Owen, whose

life was one long labor in scientific inquiry; and so has Sir William Grove, one of the most strenuous thinkers whom even this age has produced. We might lengthen the list indefinitely, but to what use, when we all know that the most intellectual among lawyers, historians, novelists, theologians, physicists, politicians and naturalists survive their contemporaries, usually with undiminished powers. In statistical accounts the clergy, whose occupation is wholly intellectual, rank first among the long-lived. A little lower down in the scale, the most hale men among us are those who have been doing intellectual work, often extremely hard work, through all their lives, and who are still so strong that all the professions are affected by their resolution not to retire, and the inability of the younger men to invent a reason for making their retirement compulsory. To say that they are picked lives is false, for they are so numerous that the intense vitality of the old and intellectual actually affects the organization of society; and to say that the unintellectual flourish equally well is not provably true. —*London Spectator.*

THE LATE HON. R. LAFLAMME.

The following notice of some of the principal incidents in Mr. Laflamme's career, condensed chiefly from the biographical work of Mr. J. C. Dent, is believed to be substantially correct.

On the 15th May, 1827, Toussaint A. Rodolphe Laflamme, was born at Montreal. His father was Toussaint Laflamme, a merchant in good standing in the commercial capital of Canada, and his mother was Marguerite Suzanne Thibauden, of Pointe Claire—a lady who traced her descent from one of the best families of France. Her father had lived at Grand Pré at the time of the expulsion of the Acadians, and he in common with his compatriots, was forced to leave the land of his birth for reasons which are familiar to all students of the history of the French domination in America. He was educated at St. Sulpice College, and while there exhibited remarkable powers of study and love for the classics. When the time came for him to make choice of a profession, he selected that of the law. He entered the office of the Hon. L. T. Drummond, Q.C., afterwards a judge of the Court of Queen's Bench. Here he made rapid progress, and in 1849 was called to the Bar of Lower Canada. Two years before this, however, and while barely in his twentieth year, young Laflamme was elected to the responsible post of president of the Institut Canadien of Montreal, a society which he had been

mainly instrumental in founding, and which, in its time, exercised considerable influence on the mental activity of the Province of Lower Canada. He was afterwards one of the founders of *L'Avenir* newspaper, and a leader of the Rouge party.

In 1852 the *Pays* was started as the organ of the moderates, while *L'Avenir* continued its advocacy of ultra-Liberal views. Mr. Laflamme was very active as the professional adviser of the Seigneurs who claimed their indemnity in virtue of the Seigniorial Act, 1857-8. While one of the editors of *L'Avenir*, he had done much to bring about a settlement of the vexed seigniorial question. He had thus for a long time made the subject a special study and was well qualified to act in the capacity of counsel for the Seigneurs, a position which he filled with great ability and judgment. On several occasions he appeared before the Judicial Committee of the Privy Council in England. In 1856 McGill College, Montreal, conferred on him the honorary degree of B.C.L., and in 1873, that of D.C.L. In 1863, he was created a Queen's Counsel. In 1875 he was offered a puisné judgeship in the Supreme Court—an honor which he declined.

Though Mr. Laflamme for many years interested himself in politics and intimately associated himself with the marked public events of his time, it was not until the general elections of 1872 that he was returned to Parliament. He was elected the representative in the Commons for Jacques Cartier, and in 1874, he was chosen by acclamation. In November, 1876, he was sworn of the Privy Council, as Minister of Inland Revenue, *vice* the Hon. Mr. Geoffrion, and was re-elected on November 28. On the 8th of June, 1877, Mr. Laflamme became Minister of Justice, a position which he continued to hold until September, 1878. He also introduced a bill for further securing the independence of Parliament. His scheme for the abolition of the office of Receiver-General and the creation of an Attorney-General who should be a Cabinet Minister and preside over the law department along with the Minister of Justice was rejected by the Senate. During the session of 1878 an act was passed under his advice, amending the Supreme Court Act, so as to increase the number of the terms of the court from two to four, also to regulate appeals from the lower provinces. A bill to amend the Election Act was also introduced by the deceased at this time and became law. During his long professional career he was regarded by his professional brethren with respect and confidence.

For forty years he occupied a very high position at the Montreal Bar, and there were very few important cases in which he was not consulted. He gave up the whole of his time to civil law and many of his opinions will stand the test of time. He was an eloquent and forcible speaker in French as well as in English. He was a man of very pronounced views on religious, social as well as legal questions. Undoubtedly the greatest case he was connected with was the famous Guibord case, in which he acted as counsel for the Institut Canadien, along with his friend, the late

Joseph Doutre, Q.C. The success achieved in this case made their names famous in legal circles throughout the Empire and beyond it.

Since the overthrow of the Mackenzie administration in 1878, and Mr. Laflamme's defeat in Jacques Cartier county by Mr. D. Girouard, M. P., the deceased gave up the whole of his time to his practice, which was a large one. A libel suit against the *Toronto Mail*, in which he recovered large damages, attracted a great deal of attention some years ago. Mr. Laflamme, among other things, had been accused of being a party to the famous ballot box stuffing case of St Anne's, generally known as "La trappe de Ste. Anne." This event occurred during the last election of Mr. Laflamme in Jacques Cartier county, when some of his over-zealous partisans, without his knowledge, tampered with the ballot box in one of the polls, substituting a large number of votes in his favor, thereby changing the result of the election. In the celebrated case of the Jesuits against the *Mail* for libel, Mr. Laflamme acted as counsel for the latter. Last year he went over to England to plead before the Privy Council. Mr. Laflamme in 1865 acted along with Messrs. Abbott and Kerr in the defence of the St. Alban's raiders. He was twice elected batonnier of the Montreal Bar.

Mr. Laflamme died at Montreal, Dec. 7th, after a very short illness.

JUDICIAL PENSIONS.

Until 1869 (says a U. S. contemporary,) there was no provision in the Statutes of the United States for pensioning Judges who had grown old in its service. In that year a statute was passed by Congress providing that: "When any Judge of any Court of the United States resigns his office, after having held his commission as such at least 10 years, and having attained the age of 70 years, he shall, during the residuo of his natural life, receive the same salary which was by law payable to him at the time of his resignation." (Rev. Stat. U. S., § 714.)

Although Congress deemed it wise to pension the Judges of the United States, few of the States have followed in its lead in providing retiring pensions for their Judges. In New York the Constitution provides: "But no person shall hold the office of Justice or Judge of any Court longer than until and including the last day of December next after he shall be 70 years of age. The compensation of every Judge of the Court of Appeal, and of every Justice of the Supreme Court, whose term of office shall be abridged pursuant to this provision, and who shall have served as such Judge or Justice 10 years or more, shall be continued during the remainder of the term for which he was elected." (Sect.

13, Art. 6, of Cons. Stat. of N. Y., Revised Stat., &c., 638.) This falls far short of a pension for life. In 1885 the Legislature of Massachusetts passed "An Act to provide for the retirement of Justices of the Supreme Judicial Court, and for their compensation in certain cases," which provided as follows: "Any Justice of the Supreme Judicial Court, having held his commission as such at least ten consecutive years, and having attained the age of 70 years, who shall resign office, shall, during the residue of his natural life, receive three-fourths of the salary which was by law payable to him at the time of his resignation, to be paid from the Treasury of the Commonwealth, in the same manner as the salaries of acting Justices are paid." (Supp. to Pub. Stats. of Mass., 82-88; Chap. 162, page 287.) Excepting these two provisions, there seem to be no laws providing pensions for retiring Judges throughout the different States.

In Pennsylvania, there is no provision, but rumor says an Act is to be introduced at the present session of the Legislature to provide pensions for Common Pleas Judges who have served 30 years. Some pension law is much needed, but it should not provide alone for one set of Judges. The Justices of the Supreme Court serve for one term of 21 years, and cannot be re-elected, (Sect. 2, Art. V. Cons. Penna. Purd. 34) and many of them, after giving up large and lucrative practices at the Bar, find themselves, if, indeed, they live through the hardships of their term, at a period of life when their labors should be done, forced to enter the arena again.

RESPONSABILITÉ DU PROPRIÉTAIRE D'UN CHIEN ENRAGÉ.

Une dépêche de Nîmes dit:—En cas de morsure par un chien enragé, le propriétaire de l'animal est-il responsable vis-à-vis de la personne mordue? Si oui, dans quelles proportions?

Les juges de Nîmes viennent de se prononcer sur ces deux points dans une affaire assez singulière. En 1891, M. Guiot, entrepreneur à Marguerittes, fut mordue par un chien appartenant à M. Jalaguier, riche propriétaire; il n'y attacha d'abord

aucune importance ; mais au bout d'un certain temps il ressentit des douleurs qui n'étaient autres que les premiers symptômes de la rage. M. Guiot cautérisa la morsure, s'embarqua pour Paris et arriva à l'Institut Pasteur.

Là, en dépit du traitement, il fut en proie à des crises violentes, qui ébranlèrent fortement son système nerveux. M. Guiot ne succomba pas, mais il sortit de l'institut avec une maladie nerveuse dont il ressent encore les effets.

A son retour, n'ayant pu s'entendre sur la question des dommages-intérêts avec M. Jalaguier, il lui intenta un procès. Le tribunal condamna M. Julaguier à payer au plaignant la somme de 11,000 francs.

Dans son audience d'hier la cour confirmait cette décision.

GENERAL NOTES.

APPOINTMENT:—J. L. Terrill, Q.C., of Sherbrooke, has been appointed sheriff of the district of St. Francis, in the place of E. R. Johnson, deceased.

THE JUDGES AND CONTEMPORARY PLAYS:—We entirely concur in the licenser of plays' objection to personal allusions to judges on the stage. The occasion of his condemnation was the production of a comic opera at the Prince of Wales, in which 'Sir Alfred May,' a Divorce Court judge, is a leading character. Originally his name was 'Sir Francis May,' which, of course, was a pointed hit but not very witty allusion to Sir Francis Jeune. Mr. Piggott did quite right in insisting upon this and other personal allusions being struck out of the piece, for while there is no reason whatever why judicial institutions should be placed beyond the reach of satire, it is consistent neither with the dignity of the Bench nor of the stage that living judges should be caricatured. There is need to emphasise this truth at the present time, because in several plays of late stage judges have 'made up' in obvious imitation of a distinguished occupant of the Bench.

—*Law Journal, (London.)*

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